# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1906.

### No. ~~172~~ 98.

THE ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

**FILED AUGUST 14, 1905.**

**(19,874.)**

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*vs.*

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 16, 1905.

1 In the Supreme Court of Appeals of West Virginia.

THE STATE OF WEST VIRGINIA
*vs.*
ST. MARYS FRANCO-AMERICAN PETROLEUM COMPANY, a Corporation. } In Mandamus.

Record and Taxation of Costs.

1905.

2 Record.

STATE OF WEST VIRGINIA:

Pleas Before the Honorable Supreme Court of Appeals of the State of West Virginia on the 27th Day of June, 1905.

STATE OF WEST VIRGINIA
*vs.*
ST. MARYS FRANCO-AMERICAN PETROLEUM CO., a Corporation. } In Mandamus.

Be it remembered, that heretofore on the 16th day of June, at a regular term of the supreme court of appeals continued and held in the city of Wheeling, county of Ohio, the following order was made and entered to wit:

Present: Hon. Henry Brannon, president, Hon. H. C. McWhorter, Hon. George Poffenbarger, Hon. Frank Cox, Hon. Joseph M. Sanders.

THE STATE OF WEST VIRGINIA
*vs.*
ST. MARYS FRANCO-AMERICAN PETROLEUM COMPANY, Respondent. } In Mandamus.

This day came the State of West Virginia by Clark W. May, attorney general, and Frank W. Nesbitt, her attorneys, and by leave of court, filed her petition praying that a peremp*roty* writ of mandamus may be awarded, directed to St. Marys Franco-American Petroleum Company, a corporation, commanding it, the said St. Marys Franco-American Petroleum Company, by power of attorney, duly executed, acknowledged and filed in the auditor's office of this State, to appoint Arnold C. Scherr, the auditor of this State, and his successors in office, attorney in fact to accept service of process and notice
3 in this State for said St. Marys Franco-American Petroleum Company, and by the same instrument to declare its consent

that service of any process or notice in this State on said attorney in fact, or his acceptance thereof endorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said St. Marys Franco-American Petroleum Company. Thereupon came as well the said St. Marys Franco-American Petroleum Company, by W. E. Chilton, its attorney, and waived the issuance of a rule against it to show cause why said mandamus should not issue as prayed for, and also waived the issuance of an alternative writ of mandamus herein, and agreed that said petition shall stand as and for such alternative writ of mandamus, and that all questions as to the very right of the case as well as the issuance or refusal of the peremptory writ of mandamus prayed for may be finally determined by the court upon demurrer to said petition without regard to forms of pleading, in which agreement the State of West Virginia, by Clark W. May, attorney general joined. And the court, having assented to said agreement, the said St. Marys Franco-American Petroleum Company, by its attorney, thereupon demurred to said petition in which demurrer the State of West Virginia, by its attorney general joined, and this case is continued.

The petition aforesaid, filed on behalf of the State, is in words and figures as follows, to-wit:

In the Supreme Court of Appeals of the State of West Virginia.

THE STATE OF WEST VIRGINIA, Which Sues by CLARK W. MAY, Its Attorney General,
*vs.*
ST. MARYS FRANCO-AMERICAN PETROLEUM COMPANY, a Corporation.

Mandamus.

4 To the honorable supreme court of appeals of the State of West Virginia:

Your petitioner, The State of West Virginia, which sues by Clark W. May, its attorney general, respectfully represents unto your honors, that:

1. The defendant, St. Marys Franco-American Petroleum Company is a non resident domestic corporation, organized, chartered, existing and carrying on its corporate business under and by virtue of the laws of the State of West Virginia, but having its principal office and place of business and chief works in the city of Lima, in the State of Ohio.

2. The said defendant corporation was organized, and now exists by virtue of a charter issued to it by the secretary of state of the State of West Virginia on the 18th day of January, 1902.

3. On the 17th day of February, 1902, the said defendant corporation, by power of attorney, duly and legally executed, filed and

recorded, appointed one Wm. M. O. Dawson, a resident of the county of Kanawha in the State of West Virginia, to accept service on behalf of said corporation, and as a person upon whom service may be had of any process or notice, and to make returns of its property for taxation.

4. Arnold C. Scherr is the auditor of the State of West Virginia, for the term of four years beginning on the 4th day of March, 1905.

5. Notwithstanding the statute of the State of West Virginia, enacted by the legislature thereof at its regular session in the year 1905, and known as chapter 39 of the Acts of the Legislature, of 1905, requiring every non-resident domestic corporation, and every foreign corporation doing business in this State, to appoint
5 the auditor of this State, and his successor in office, attorney in fact to accept service of process and notice in this State for such corporations, by power of attorney duly executed, acknowledged and filed in the said auditor's office and requiring every such corporation by the same instrument to declare its consent that service of any process or notice in this State on said attorney in fact, or his acceptance thereof endorsed thereon, shall be equivalent for all purposes to, and shall be and constitute due and legal service upon said corporation, the said defendant corporation has failed and refused, and doth now fail and refuse, to appoint the auditor of this State and his successors in office, attorney in fact to accept service of process and notice in this State for said defendant corporation, although often requested so to do; and has failed and refused, and does now fail and refuse, to declare its consent that service of any process or notice in this State on said auditor as attorney in fact for said defendant corporation, or his acceptance thereof endorsed thereon, shall be equivalent to, and shall be and constitute, due and legal service upon said defendant corporation, although often requested so to do; and has repeatedly declared, and does now declare, that it, the said defendant corporation, will not obey said statute, and will not make the appointment thereby required, and will not declare its consent as therein commanded.

Your petitioner now therefore prays that a peremptory writ of mandamus may be awarded, directed to the said St. Marys Franco-American Petroleum Company, commanding it the said St. Marys Franco-American Petroleum Company, by power of attorney, duly executed, acknowledged and filed in the auditor's office of this State, to appoint said auditor, and his successors in office, attorney in fact to accept service of process and notice in this State
6 for said St. Marys Franco-American Petroleum Company, and by the same instrument to declare its consent that service of any process or notice in this State on said attorney in fact, or his acceptance thereof endorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said St. Marys Franco-American Petroleum Company.

THE STATE OF WEST VIRGINIA,
By C. W. MAY, Attorney General.

The demurrer on behalf of the respondent, aforesaid, is in words and figures, as follows, to-wit:

In the Supreme Court of Appeals of West Virginia, at Charleston.

THE STATE OF WEST VIRGINIA
*vs.*
SAINT MARYS FRANCO-AMERICAN PETROLEUM COMPANY. } Mandamus.

And now comes the defendant, The St. Mary's Franco-American Petroleum Company, and moves the court to quash the alternative writ of mandamus herein, and also demurs to the said alternative writ; and for cause of demurrer, and for ground of said motion to quash, the defendant says:

That the act of the legislature passed February 22, 1905, requiring corporations like this defendant to appoint by power of attorney, duly executed, the auditor of West Virginia, its attorney in fact, to accept service of process for it, and upon whom process can be served, and creating the auditor as attorney in fact for this defendant,
7 is null and void, because it is in violation of the fourteenth amendment to the Constitution of the United States, and is also in violation of the bill of rights of the State of West Virginia and of the constitution of said State.

Second. That it is shown by said alternative writ, that this defendant has already selected *and* agent in the State of West Virginia, and selected such agent under the provisions of section 24 of chapter 54 of the Code, within thirty days after this defendant was incorporated; which said agent or attorney being Hon. William M. O. Dawson, then residing in the city of Charleston, county of Kanawha and State of West Virginia, where he has resided ever since, and still resides; that said Dawson accepted the said appointment and has been acting in that capacity for this defendant ever since, and still is so acting, and that this defendant, in the writing appointing said Dawson, agreed and consented, that service of process upon said Dawson, or the acceptance of the same by him, would constitute due and legal service upon this defendant; and the said Dawson was, at the time the said act was passed, and has been ever since, and still is, acting under said appointment, and that this defendant executed a regular power of attorney at the time aforesaid, to-wit, within thirty days after its incorporation, and had the same recorded as required by section 24 of chapter 54 of the Code; and this defendant maintains, that the legislature has no power to name the agent or attorney for this defendant, especially when this defendant has never failed to have a regular agent and attorney in fact, upon whom any process against it could be served.

8 Third. The said alternative writ shows, upon its face, that the law aforesaid, which is, by the said writ, attempted to be

enforced, is harsh, oppressive and violative of private right, and is subversive of the right of this defendant to select its own agents, and to make its own contracts with such agents; and is a useless, needless and oppressive piece of private legislation, which denies to this defendant, the equal protection of the laws.

ST. MARYS FRANCO-AMERICAN
PETROLEUM CO.,
By W. E. CHILTON, Its Attorney.

On another day, at a special term of the supreme court of appeals, held by due warrant therefor, in the city of Charleston, county of Kanawha, on the 27th day of June, 1905, the following order was made and entered, to-wit:

Present: Hon. Henry Brannon, president, Hon. H. C. McWhorter, Hon. George Poffenbarger, Hon. Frank Cox, Hon. Joseph M. Sanders.

THE STATE OF WEST VIRGINIA, Petitioner,
*vs.*
ST. MARYS FRANCO-AMERICAN PETROLEUM COMPANY, Respondent. } In Mandamus.

This day came the petitioner by Clark W. May, Frank Lively, Frank W. Nesbitt and Brown, Jackson & Knight, her attorneys, and the respondent, by L. E. McWhorter and Chilton, McCorkle & Chilton, its attorneys, and by agreement of counsel, this case was fully heard upon its record, and the arguments of counsel thereon, and is submitted for decision.

And the court, having maturely considered the petition, and the questions arising on the demurrer thereto, is of opinion that said defense is not sufficient to bar a writ of mandamus. It is
9 therefore considered that a peremptory writ of mandamus be awarded in this case directed to St. Marys Franco-American Petroleum Company, commanding it, the said St. Marys Franco-American Petroleum —, by power of attorney duly executed, acknowledged and filed in the auditor's office of this State, to appoint said auditor and his successors in office, attorney in fact to accept service of process and notice in this State for said St. Marys Franco-American Petroleum Company, and by the same instrument to declare its consent that service of any process or notice in this State on said attorney in fact, or his acceptance thereof endorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon the said St. Marys Franco-American Petroleum Company, and that the petitioner recover from the respondent, her costs about the prosecution of her petition in this court in this behalf expended. Judge Sanders dissented from the decision.

MEMO.—No written opinion was filed in this case. Judges present and concurring in the decision were Hon. Henry Brannon, president; Hon. Henry C. McWhorter, Hon. George Poffenbarger and Hon. Frank Cox.

On the same day the following order was made and entered, to-wit:

THE STATE OF WEST VIRGINIA, Petitioner,
*vs.*
ST. MARYS FRANCO-AMERICAN PETROLEUM CO., Respondent.
} In Mandamus.

The respondent stating that it desires to present a petition
10 to the Supreme Court of the United States for a writ of error to the judgment this day rendered in this case, on its motion, it is ordered that the execution of the said judgment be suspended for ninety days after this date provided bond be given before the clerk of this court in the penalty of five hundred dollars, with good security, with condition as set forth in the Code of 1899, chapter 135, section 30.

STATE OF WEST VIRGINIA, *To wit:*

I, Wm. B. Mathews, clerk of the supreme court of appeals of said State, do hereby certify that the foregoing is a true, correct and complete transcript of the record in the case of The State of West Virginia *vs.* St. Marys Franco-American Petroleum Company, a corporation, in mandamus, lately pending in said court, as fully as the same appears of record and on file in my said office.

Given under my hand and the official seal of the said court, this 17th day of July, 1905.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals of West Virginia.

11 Stay Bond in Supreme Court of Appeals.

Know all men by these presents that we, the St. Marys Franco-American Petroleum Company, a corporation, by W. E. Chilton, a responsible person, and Charles W. Swisher, surety, are held and firmly bound unto the State of West Virginia, in the just and full sum of five hundred dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assignees, jointly, severally and firmly by these presents.

Sealed with our seals this 21st day of July, 1905.

The condition of the above obligation is such, that, whereas, the St. Marys Franco-American Petroleum Company intends to present a petition to the Supreme Court of the United States and obtain a writ of error to the judgment of the supreme court of appeals of West Virginia, rendered on the 27th day of June, 1905, in a case therein lately pending in mandamus, wherein The State of West Virginia was petition- and said company was respondent.

Now, therefore, if the said The St. Marys Franco-American Petroleum Company, a corporation, shall well and truly pay and satisfy all damages that the State of West Virginia or any person may sustain by reason of the suspension of the execution of the judgment aforesaid for the period of ninety days from the date thereof, as ordered by the supreme court of appeals of West Virginia, in
12 case a writ of error to the judgment should not be allowed and be effectual within the time so specified, then this obligation to be void, else to remain in full force.

W. E. CHILTON,
For St. Marys Franco-American
Petroleum Company. [SEAL.]

I solemnly swear that I am worth more than $500.00 above my debts and liabilities. My property consists of stocks and is in the State of West Virginia, and county of Kanawha.

C. W. SWISHER. [SEAL.]

Signed, sealed, acknowledged and sworn to before me, and approved as sufficient, this 21st day of July, 1905.

WM. B. MATHEWS,
Clerk Supreme Court of Appeals of West Virginia.

STATE OF WEST VIRGINIA, *To-wit:*

I, Wm. B. Mathews, clerk of the supreme court of appeals of the State of West Virginia, do hereby certify that the foregoing writing is a true and correct copy from the records of my office.

Given under my hand and the seal of said court this 21st day of July, 1905.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS, Clerk.

13 Taxation of Costs.

STATE OF WEST VIRGINIA
*vs.*
ST. MARYS FRANCO-AMERICAN PETROLEUM CO. } No. 454.

Writ of mandamus, granted June 27, 1905.

Costs in the Supreme Court of Appeals.

Petitioner's Costs.

| | |
|---|---|
| Clerk | $6.75 |
| Printing record | |
| Clerk of circuit court for transcript | |
| Sheriff —— —— serving process | |
| —— —— serving notice | |
| Order of publication | |
| Attorney | 30.00 |
| Total | 36.75 |

Respondent's Costs.

| | |
|---|---|
| Clerk including transcript of record | 8.60 |
| Printing record | |
| Clerk of circuit court—supp'l transcript | |
| —— —— serving notice | |
| Damages, Code chap. 135, sec. 27 | |
| Attorney | |
| Total | 8.60 |

Attest:

WM. B. MATHEWS, Clerk.

14 [Endorsed:] No. 454. State of West Virginia *vs.* St. Marys Franco-American Petroleum Company. Record and costs. From the supreme court of appeals of West Va.

15 In the Supreme Court of Appeals of the State of West Virginia.

THE STATE OF WEST VIRGINIA
*vs.*
THE ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY. } Mandamus.

Assignment of Errors.

Now comes the defendant and respondent and files herewith its petition for a writ of error, and says that there are errors in the

records and proceedings of the above entitled case, decided by the supreme court of appeals of the State of West Virginia, on the 27th day of July, 1905, which said court is the highest court in the State of West Virginia in which said case could be heard and determined, and the said defendant and respondent, for the purpose of having the same reviewed by writ of error in the Supreme Court of the United States, makes the following assignment of errors.

The said defendant and respondent was a corporation created and organized under the laws of the State of West Virginia in 1902, under the statutes of West Virginia at that time in force
16 One of the statutes then in force, to-wit: section 24 of chapter 54, required such a corporation as defendant and respondent, to appoint some person residing in the State of West Virginia, as agent or attorney upon whom process against said defendant corporation could be served, and required such appointment to be by power of attorney, duly recorded, which said power of attorney was duly executed and recorded as required by law, and said appointment made in accordance with said statute, within thirty days after the incorporation of the defendant. The said attorney or agent so appointed, resided at the time of his appointment at the capital of the State, in Kanawha county, and has resided there ever since and still resides there, has accepted the appointment aforesaid, and has been since his appointment acting for the defendant, and nothing has occurred to disturb the relation created by said appointment and power of attorney, except the act of the legislature of West Virginia herein complained of. On the 22nd day of February, 1905, the legislature of West Virginia passed an act by which the auditor of the State was arbitrarily created attorney in fact for all corporations such as the said defendant and respondent, and the same act required this defendant and respondent to make, execute and acknowledge a power of attorney, creating the auditor of the State of West Virginiathe attorney in fact for said defendant and respondent, and requiring it
17 to declare in such instrument, its consent that any process served upon said auditor, would be a personal service upon said defendant and respondent. The said defendant and respondent refused to comply with said act of the legislature and refused to execute such a power of attorney and make such a declaration, and thereupon the State of West Virginia instituted this action, the object of which is to compel the said defendant and respondent by mandamus to make, execute, acknowledge and file the said power of attorney, appointing the said auditor its agent and attorney and declaring the said consent as required by said act of February 22nd, 1905.

The said defendant and respondent thereupon demurred to the said petition for mandamus and the alternative writ therefor, and moved to quash them upon the ground that the said act of the legislature of February 22nd, 1905, was contrary to the fourteenth amendment to the Constitution of the United States, and that the said act of the legislature deprived the said defendant and re-

spondent of its liberty of private contract, of its right to select its own agents, and denied to it the equal protection of the laws; and further that the said act of the legislature impaired the obligation of the contract between the State of West Virginia and the said defendant, involved in the act of incorporation by which it became a body corporate; and further that the logical effect of the said
18 act of the legislature would be to deprive the said defendant of its property without due process of law.

The said supreme court of appeals of West Virginia by its decision and judgment overruled said demurrer and refused said motion to quash, and granted and issued the said writ of mandamus, compelling the said defendant and respondent to comply with the requirements of said act of February 22, 1905. In so doing the said supreme court of appeals of West Virginia erred, because by said decision it held that said act of February 22nd, 1905, is not contrary to the fourteenth amendment to the Constitution of the United States.

The said errors are more particularly set forth as follows:

First. The said court erred in holding that the said act of the legislature of West Virginia of February 22, 1905, is valid and binding upon this defendant and respondent.

Second. It erred in not holding that said act of the legislature is contrary to the fourteenth amendment to the Constitution of the United States.

Third. It erred in issuing the said writ of mandamus compelling this defendant and respondent to appoint a particular person as its agent and attorney, when this defendant and respondent al-
19 ready had an agent and attorney, clothed with all the powers and rights necessary in the premises, and in compelling this defendant and respondent to enter into a contract, to wit: execute a power of attorney containing provisions and agreements repugnant to the wishes and desires of this defendant and respondent and against its wishes and in violation of its private right of contract and its liberty to contract with whom it pleases and to make such contracts as it desires.

Fourth. It erred in holding the said act of February 22nd, 1905, valid and binding because the said act deprives this defendant and respondent of the equal protection of the laws, in that the said act of the legislature imposes a tax upon this defendant and respondent not imposed upon other corporations, which said tax is for a private purpose and not for a public purpose.

Fifth. It erred in over-uling the said demurrer and denying said motion to quash and in granting said writ of mandamus, for which errors, the said defendant, The St. Mary's Franco-American Petroleum Company, prays that the judgment of the said supreme court of appeals of the State of West Virginia, dated and entered on the 27th day of June, 1905, be reversed and set aside, and that a judgment be entered for the said defendant and for costs.

ST. MARY'S FRANCO-AMERICAN
PETROLEUM COMPANY.
W. E. CHILTON, Attorney.

20 In the Supreme Court of Appeals of the State of West Virginia.

THE STATE OF WEST VIRGINIA
*vs.*
THE ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY. } Mandamus.

Petition for Writ of Error.

The St. Mary's Franco-American Petroleum Company, the above named defendant and respondent, considering itself aggrieved by the final decision of the supreme court of appeals of the State of West Virginia, dated and entered on the 27th day of June, 1905, in rendering a judgment against it in the above entitled case, it hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and it files herewith an assignment of errors.

ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY.
W. E. CHILTON, Attorney.

21 In the Supreme Court of Appeals of the State of West Virginia.

THE STATE OF WEST VIRGINIA
*vs.*
THE ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY. } Mandamus.

Before me, Henry Brannon, president, and as such, chief justice of the supreme court of appeals of the State of West Virginia, the same being the highest court in said State in which the above entitled case could be heard, and in which said court it was heard and determined and final judgment rendered on the 27th day of June, 1905, granting a peremptory writ of mandamus against the defendant, requiring it to comply with the provisions of the act of the legislature of West Virginia, passed February 22nd, 1905, came the above named defendant and respondent, The St. Mary's Franco-American Petroleum Company, and presented its petition for a writ of error from the judgment aforesaid, and praying that the said case may be reviewed by the Supreme Court of the United States, and filed also an assignment of errors, setting forth certain errors alleged to have been committed by the supreme court of appeals of the State of West Virginia.

And, thereupon, the said writ of error is granted, and it is ordered

that the same do issue upon the execution of a bond by
22 the said St. Mary's Franco-American Petroleum Company, or someone for it, payable to the State of West Virginia, in the sum of one thousand dollars, with a condition that the said plaintiff in error shall prosecute its said writ of error to effect, and answer and pay all costs and damages that may be adjudged if it shall fail to make good its plea; said bond when approved to act as a supersedeas to the judgment of the supreme court of appeals of West Virginia aforesaid.

Given under my hand this 25th day of July, 1905.

HENRY BRANNON,
President, and as Such Chief Justice of the Supreme Court of Appeals of the State of West Virginia.

Bond as required above, was this day given and filed, and by me approved, this 25th day of July, 1905.

HENRY BRANNON,
President, and as Such Chief Justice of the Supreme Court of Appeals of the State of West Virginia.

23 Supreme Court of the United States.

THE STATE OF WEST VIRGINIA
*vs.*
THE ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY.

Bond.

Know all men by these presents, that we, W. E. Chilton, a responsible person, for the St. Mary's Franco-American Petroleum Company, as principal, and C. W. Swisher, as surety, are held and firmly bound by the State of West Virginia, in the sum of one thousand dollars, to be paid to it, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 22nd day of July, 1905.

Whereas, the above named St. Mary's Franco-American Petroleum Company, as plaintiff in error, seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled case by the supreme court of appeals of the State of West Virginia.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of
24 error to effect, and answer and pay all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

W. E. CHILTON,
Responsible Person, for the St. Mary's Franco-American Petroleum Company.
C. W. SWISHER.

STATE OF WEST VIRGINIA, }
County of Kanawha, } *ss:*

C. W. Swisher being duly sworn, upon his oath says; that he is of lawful age and a citizen of the State of West Virginia, and knows the contents of the foregoing instrument to which his name is signed and attached; and further, that he is worth more than the sum of one thousand dollars, over and above all debts, liabilities and exemptions.

Subscribed and sworn to before me this 22nd day of July, 1905.

FRED H. SCOTT,
Notary Public, Kanawha County, West Virginia.

The above bond is approved this 25th day of July, 1905.

HENRY BRANNON,
President, and as Such Chief Justice of the Supreme Court of Appeals of the State of West Virginia.

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the supreme court of the State of West Virginia:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of appeals of the State of West Virginia, before you, at the June term, 1905, thereof, between The State of West Virginia, plaintiff, *versus* The St. Mary's Franco-American Petroleum Company, a corporation, defendant, a manifest error has happened, to the great damage of the said defendant, The St. Mary's Franco-American Petroleum Company as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the
26 United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25" day of July, 1905.

Done in the city of Charleston, with the seal of the circuit court

of the United States for the southern district of West Virginia attached.

{Seal Circuit Court United States, Southern District West Virginia, Charleston, West Va.}

EDWIN M. KEATLEY,
Clerk Circuit Court United States, Southern
District of West Virginia.

Allowed.
HENRY BRANNON,
President, and as Such Chief Justice of the
Supreme Court of Appeals of the State of
West Virginia.

27 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of West Virginia, wherein The St. Mary's Franco-American Petroleum Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

HENRY BRANNON,
Chief Justice of the Supreme Court
of the State of West Virginia.

Attest this 25th day of July, 1905.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk of the Supreme Court of the State of West Virginia.

28 CHARLESTON, WEST VIRGINIA, July 25th, 1905.

I, C. W. May attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

C. W. MAY,
Attorney for the State of West Virginia.

29 UNITED STATES OF AMERICA, ss:

Supreme Court of Appeals of West Virginia.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, wherein The State of West Virginia was plaintiff and The St. Mary's Franco-American Petroleum Company was defendant, the said last named company being plaintiff in error in the said Supreme Court of the United States, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court of appeals of the State of West Virginia, in the city of Charleston, this 25th day of July, 1905.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk of the Supreme Court of Appeals
of the State of West Virginia.

Costs of Suit.

In the supreme court of appeals of West Virginia..... $45.35

Attest:
WM. B. MATHEWS, Clerk.

30 [Endorsed:] 1905 The State of West Virginia *vs.* The St. Mary's Franco-American Petroleum Company. Chilton, MacCorkle & Chilton, attorneys, Charleston, West Virginia.

Endorsed on cover: File No. 19,874. West Virginia supreme court of appeals. Term No. 372. The St. Mary's Franco-American Petroleum Company, plaintiff in error, *vs.* The State of West Virginia. Filed August 14th, 1905. File No. 19,874.

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| STATE OF WEST VIRGINIA<br>vs.<br>ST. MARYS FRANCO-AMERICAN PETROLEUM Company. | In Mandamus. Writ Granted. |

Brannon, Pres.

Syllabus.—Point 1. That provision of ch. 39, Acts of 1905, requiring the corporations specified to appoint the auditor as attorney to accept service of process and notice, is not unconstitutional.

BRANNON, Pres.:

By ch. 39, Acts 1905, the State auditor was constituted the attorney in fact for every foreign corporation doing business in this State, and for every non-resident domestic corporation, and every such corporation is required, by power of attorney duly executed by it, to appoint the auditor its attorney in fact to accept service of process and notice in this State for it, and by the same instrument to declare its consent that service of any process or notice in this State on said attorney, or his accepting shall be equivalent to and shall be, due and legal service upon the corporation. The act requires the corporation to pay yearly ten dollars to the auditor for acting, to be turned into the treasury by him. The defendant refusing to execute such power of attorney, the State asks a mandamus to compel it to do so. The corporation asserts that no duty rests upon it by reason of said act, because it is unconstitutional. The corporation says that the act denies it freedom of contract, freedom of choice of its agent, compels it to pay money, deprives it of property without due process of law, contrary to both the State and Federal constitutions. We cannot concede this. We shall not discuss the general power of a State over corporations taking charters under it, or foreign corporations coming to the State by its grace to do business in it. It might be plausibly said that a foreign corporation, or a non-resident domestic corporation, having no office or officers in the State, the State, under power to regulate corporations, and particularly to see to it that judicial process to answer suits by proper means be made available, has the power assumed in the statute. It is a duty, and must be a legitimate power, that the State render effective the jurisdiction of its courts against corporations accepting its charter and doing business in the State, or chartered by another State and doing business in the State, but having, perhaps, no officer to be readily found in the State. We can see how often the service of process, without which court procedure would be ineffectual and not due process, may be delayed, or be inconvenient, or be frus-

trated; and we can see how the State must have wide power in such case to secure service of the process of its courts, so its legislation do not deprive the just right of the corporation. It ought to answer suitors in the courts. If the statute deprives the corporation of an essential right, its action would not be held good; but what right does this act take away? If the auditor were clothed with discretion to do an act harmful to the corporation, complaint might be justly made; but the auditor does nothing but accept service, a mere ministerial act. He does not confess judgment, nor does he do any discretionary act. Doubtless if he fail to warn his corporation of the suit, he would be liable on his bond, just as to any person for failure to perform a legal duty. Before the act of 1905, the code required a corporation to appoint such attorney. This act changes this so far as to make the auditor such attorney, thus taking from it the choice of person, sometimes a valuable right, but in this instance not so. But whether but for § 8, ch. 53, Code, this act would be valid, we need not, do not say. That section reads thus: "Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company." When the defendant obtained its charter, that section was in force, and this charter is subject to it. Under such a reservation of right, either to amend a charter, or to change the law regulating it, there is no limit to legislative power. It even includes right of repeal. In this instance the State has simply amended the law as to the appointment of an agent; has only made a public officer, attorney, so that there be one particular person, at a fixed place, always to be found, and known to all to be the attorney, dispensing with the inconvenience and uncertainty of ascertaining persons for service. 7 Am. & Eng. Enc. L., 2nd ed., 671; Citizens Bank vs. Owensboro, 173 U. S. 636, and other cases cited in Brannon's Fourteenth Amendment, 365. When a charter issues under such law, the State has this right of amendment of the law in force before the charter; it is a condition of the charter as fully as if that right were in words in the charter. The law inserts or reads it into the charter. 10 Cyc. 1087; Cross vs. Railroad, 35 W. Va. 177. If the corporation do not see proper to conform to it, it must discontinue business, as the legislature cannot force it to do business under the change. Yeaton vs. Bank, 21 Gratt., 593. It cannot be said that the 14th amendment is violated because the act discriminates, requiring certain corporations, and not others, to appoint the auditor. As to domestic corporations having offices and officers in the State, on whom service of process can be had there is not need of such a statute but as to those not so situated, there is need. The classification is based on the

reason of their being differently circumstanced, and this justifies such discriminating classification. Copper Co. v. Scherr, 50 W. Va. 533; McGoun v. Illinois, 170 U. S. 283. As to the exaction of ten dollars for the service of the auditor. If his appointment is valid, this feature cannot render the statute invalid as taking property without due process. The auditor is paid by the State, and the State by its officer, renders valuable service to the corporation. South Carolina instituted a commission for regulation of railroads, and required the company to pay salaries of its members, on the theory that the State had power of regulation and the service redounded to the benefit of the railroad company. The act was held not to violate the 14th amendment either as taking property without due process of law, or as denying the company the equal protection of the law. Charlotte Co. v. Gibbes, 142 U. S. 386. To the same effect, People v. Budd, 145 U. S. 175. That feature of the act providing that the corporation shall not be required to pay any fee to any one who may have been before appointed such attorney, was mentioned in oral argument as violating the constitution in impairing the obligation of a contract. That does not arise in this case. It is a matter between different persons. Further, that is a provision separable from the clause requiring the corporation to appoint the auditor, and if unconstitutional, would not touch or infect that provision. 26 Am. & Eng. Enc. Law, 2nd ed., 570.

STATE OF WEST VIRGINIA, *To-wit:*

The foregoing is a true and correct copy of the opinion of the supreme court of appeals filed on the 15th day of September, 1905, in the case of The State of West Virginia vs. St. Marys Franco-American Petroleum Company in mandamus decided on the 27th day of June, 1905.

Given under my hand this 20th day of October, 1905.

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

[Endorsed:] File No. 19,874 Supreme Court U. S. October term, 1905 Term No. 372. The St. Mary's Franco American Petroleum Co., pl'ff in error, vs. The State of West Virginia Certified copy of opinion of supreme court of appeals of West Virginia. Filed Oct. 21, 1905.

STATE OF WEST VIRGINIA
vs.
ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY.

SANDERS, judge, dissenting:

I cannot concur in holding that chapter 39, Acts 1905, wherein it requires non-resident domestic corporations to appoint the auditor attorney in fact to accept service of process and notice, is constitu-

tional. The defendant here was organized and now exists by virtue of a charter issued to it by the secretary of state on the 18th day of January, 1902, and on the 17th day of February, 1902, by power of attorney, duly executed, filed and recorded, as provided by section 24, chapter 54 of the Code, it appointed Wm. M. O. Dawson, a resident of the county of Kanawha, in this State, its attorney in fact to accept service of process and notice in its behalf, and as a person upon whom service might be had. There is no complaint that the defendant did not fully comply with the statute as it existed prior to the passage of chapter 39, Acts 1905, but it is the provisions of this act it is alleged to have violated, and application is made to this court for a writ of mandamus to enforce compliance therewith. The defendant contests the right of the State to compel it to comply with the provisions of chapter 39 and urges as the reason why it should not be compelled to do so, that it is in violation of both the Federal and State constitutions, in this, that it deprives it of the liberty to contract and select its own attorneys and agents, and that it is calculated to deprive and may deprive corporations of their property without due process of law.

The law prior to the pass-ge of this act, was entirely adequate to make process available against foreign and non-resident domestic corporations, and completely protected suitors against such corporations, by providing for the appointment of an attorney in fact to accept service of process, etc., and by requiring the power of attorney by which the appointment was made to be recorded; and just what called for the passage of chapter 39 is difficult to determine, unless it was for the purpose of increasing the State's revenues. It does not afford any additional or more efficacious means of serving process than existed prior to its enactment. Therefore, the act under consideration could be declared unconstitutional without, in the least, impairing the rights of any person who may desire to resort to the courts of this State for the enforcement of his rights against such corporation.

The selection, by a corporation, of its officers and agents, for the purpose of managing and conducting its business of all kinds whatsoever, is the highest and most important right which can be exercised by it, because its business is conducted solely by its officers and agents, and under the provisions of the act in question, the defendant is deprived of this paramount right, and instead thereof, the State has imposed upon it the duty of selecting the State auditor as such agent. The right to have notice of suit brought against it is an exceedingly important right—so important that it should have the right of selecting its own agents for this purpose. It should be left to the corporation to determine whether or not the agent is competent to transact the business, and one in whom it would repose so important a trust, and to deny it this right is to clearly invade that constitutional provision that no porson shall be deprived of life, liberty or property without due process of law. When the State selects one of its officers and compels his appointment as attorney in

fact for the corporation, any judgment obtained against such corporation under a service upon such agent, is not a judgment obtained by due process of law.

Judge Brannon, in delivering the opinion of the court, says: "If the State deprive the corporation of an essential right, its action would not be held good." In determining the rights of a corporation, I fail to see what right or power is more essential to the successful management and safety of its business than the selection of its agents and servants, and especially in the selection of an agent to accept service of process for it, or upon whom service of process may be had in any suit which may be filed against it. A failure to notify a corporation of a suit pending against it, may mean absolute destruction to the corporation, without remedy. If the act in question is constitutional, and the State has the power to select an agent to accept service of process, then where does such power end? Would it not have the power to select any other officer or agent of the company? If the corporation can be deprived of the agent of its own choosing in one instance, why cannot the State deprive it of the selection of all its agents? There is as much reason to say that the State can appoint all as to say it can appoint one. There is no public necessity for the appointment of an agent to receive service of process, until after the right of selection has first been given to the corporation, and it fails or refuses to exercise it.

What remedy is given the corporation where the auditor fails to notify it of any suit brought against it? Judge Brannon says: "Doubtless if the auditor fails to warn the corporation of the suit, he would be liable on his official bond." I know of no law that fixes any such liability on the auditor. The act in question does not do so. While it is true he is a State official, yet he is not a State official when acting as attorney in fact for the corporation. The corporation is required to appoint him as *its* agent, and in this respect he is not the agent of the State nor acting for the State. But suppose he could be held liable on his bond; the penalty of it, as fixed by statute, is twenty thousand dollars. Is this adequate to meet any such liabilities as may arise by reason of his failure to perform his duties in this respect? In what way can it be determined? The statute does not contemplate that the auditor's bond is taken to cover any such liability.

None of the authorities cited by the attorney for the State apply to this case. They refer to foreign corporations entirely, and in some of the cases the power of selection is first given to the corporation, with the provision that if it fail to make the appointment, service may be had upon some State official, while in the other cases it is held that a foreign corporation can exercise the right to do business in a State only by comity, or as an act of grace on the part of the State, and the condition upon which the power is extended goes with it, and cannot be separated from it; so that if the privilege is enjoyed, the condition must be performed, and all corporations referred to in these cases were permitted to do business in

the State upon the express condition that they appoint a certain person to accept service of process, etc. The case of Fisher vs. Traders' Mutual Life Ins. Co., 48 S. E. R., is attempted to be applied here. It has no application, because it gives the corporation first the power to select its own agent, and provides that if it fails to make the selection, process may be served on the secretary of the corporation commission. No such right was extended to this defendant. If so, it would have no just ground of complaint, and doubtless would not be complaining. And upon an examination of all the authorities cited by counsel for the State, it will be found that they do not support the State's contention. The State should have the right to require non-resident domestic corporations to appoint an agent or representative in the State to receive service of process and notices in legal proceedings instituted against them, and to provide, upon their failure to make such appointment, that service may be had upon a public official, designated for that purpose, or in some other prescribed way. But the State has no power to complel a non-resident domestic corporation to appoint any particular officer or person as its agent to accept service of process, etc., until it has been given the right to select some one of its own choosing, and a failure upon its part to do so.

"Judgment against corporation on leaving summons with recorder of deeds, though authorized by statute, is not by due process under the fourteenth amendment."—Brannon's Fourteenth Amendment, 263. And the author cites Pinney vs. Providence Co., 82 N. W., 308, which decides that a statute authorizing service of process on a corporation by leaving a copy of such process with the register of deeds, is unconstitutional, as in violation of the Constitution of the United States, declaring that no State shall deprive any person of life, liberty or property without due process of law. There are much stronger reasons for holding in this case that chapter 39 is unconstitutional, than there were for holding unconstitutional the act in the case just cited, for, by the Wisconsin statute, it was required that on or before October 1, 1898, the corporation file in the office of the register of deeds a list of the names of its officers, therein mentioned, on whom service of process, notices or orders, might be made, as provided by another section of the statute, and provided further that in all cases where such list of officers was not filed as aforesaid, service of all legal process, notices or other legal proceedings, might be lawfully and effectually made upon any such corporation by giving to and leaving with said register of deeds true copies of such legal process, orders, notices or proceedings, in which case service so made should be valid.

Then, again, the defendant is required by this act to pay to the auditor, as its attorney, the stipulated sum of ten dollars for his services. Not only is the right to select its own agent taken away from the corporation, but it is deprived of the liberty to contract with its agent as to the compensation which such agent is to receive for his services. Judge Brannon says: "The auditor is paid by the

State, and the State, by its officer, renders valuable service to the corporation." This may be true, but still it is no reason why the defendant can be deprived of the liberty to contract, as guaranteed to it by the Constitution. In Brannon's Fourteenth Amendment, page 110, the author says: "But what does the word 'liberty' mean in American constitutions? This is the test question here, for it means in the fourteenth amendment just what it means in the State constitutions. It means personal liberty. This includes more than mere exemption from imprisonment. I should say that it means exemption or immunity from unlawful imprisonment or detention of the body, freedom to go or come on lawful business or pleasure, commonly called the right of locomotion; the right to acquire, hold and convey property; the right to make contracts and to labor in any lawful calling to earn a living;" etc.

In State v. Peel Splint Coal Co., 36 W. Va., 856, Judge Brannon, in delivering the opinion of the court, says: "The word 'liberty,' as here used, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, to make lawful contracts therein, to the end of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness. The right to contract and be contracted with is indispensable to these indispensable objects. * * * Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed, under all civilized governments, than this right of contract." I fully concur with the court in construing this constitutional provision and defining the word "liberty," as embracing the right to contract and be contracted with, and if this is the proper construction, then it seems to me that no argument is necessary to show that the act in question is unconstitutional, because it deprives the defendant of its right to contract with its agent.

The validity of the act in question is upheld by the court by virtue of sec. 8, ch. 53, Code, for Judge Brannon, speaking for the court, says: "But for said sec. 8, we need not, do not say whether or not the act would be valid." If chapter 39, Acts 1905, is unconstitutional but for said section 8, I fail to see how this section can rob it of its unconstitutional features, and render constitutional an unconstitutional act. It is true the State in said section 8 reserved the power to alter any charter or certificate of incorporation, and to alter or appeal any law applicable to a joint stock company. This is a legislative and not a constitutional reservation, and while the State has reserved such powers, yet it cannot reserve to itself the right to pass an act in derogation of the constitution. Therefore, section 8, chapter 53, cannot relieve the act in question of its unconstitutional features. Mr. Justice Cooley, in Detroit v. Howell Plank Road Co., 43 Mich., 140, speaking of the provision of the Constitution of the United States, which forbids the impairment of obliga-

tions of contracts, says that, but for this provision, "the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be, if unrestrained by express constitutional limitations and with the powers it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles."

In Citizens' Bank v. Owensboro, 173 U. S., 636, and many other cases, it is said, in upholding the reserved powers to alter or repeal the charter of a corporation, that under such reservation the legislature may exercise the right without impairing the obligation of the contract. This is because the reservation qualifies the grant, and whenever the legislature exercises the power which it has expressly reserved, it does not impair the obligation of its contract, because it is a part of the contract that it shall be at liberty to exercise that power. It is not claimed that chapter 39 is invalid because it impairs the obligation of a contract, but because it is in conflict with the fourteenth amendment to the Constitution of the United States. The State cannot reserve unto itself the power to pass an unconstitutional act. Whatever power the State may possess over corporations in their creation, or in passing or amending the laws under which they are formed, it cannot withdraw from them the guarantees of the Federal Constitution.

The object of the reservation, in whatever form expressed, was to preserve to the State control over the corporate franchise rights and privileges, which in her sovereign or legislative capacity she had called into existence; in other words, to enable her to annul or modify that which she had created. It was not its object to interfere with contracts which the corporation, when once created, might make, nor with the property which it might acquire. With respect to everything else, it gives no power that the State would not have had without it. The artificial body created by the legislature is composed of natural persons who have combined their property to obtain an object beyond their individual resources, and who are clearly entitled, under the guaranties of the Constitution, to be secured in the possession and use of their property thus held, with the liberty to contract in regard thereto, as before they had associated themselves together. Mr. Justice Field says: "Whatever the State may do with the creations of its own will, it must do in subordination to the inhibitions of the Federal Constitution. It may confer by its general laws upon corporations certain capacities of doing business and of having perpetual succession in its members. It may make its grant in these respects revocable at pleasure; it may make it subject to modifications; it may impose conditions upon its use and reserve the power to change these at will. But whatever property the corporation acquires in the exercise of these capacities conferred, it holds under the same guarantees which protect the property of individuals from spoliation; it cannot be taken for public

use without compensation; it cannot be taken without due process of law; nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

For the foregoing reasons I would refuse the writ.

STATE OF WEST VIRGINIA, *To-wit:*

The foregoing is a true and correct copy of the dissenting opinion of Judge Sanders filed on 20th day of October, 1905, in the case of The State of West Virginia vs. St. Marys Franco-American Petroleum Company in mandamus decided on the 27th day of June, 1905.

Given under my hand this 20th day of October, 1905.

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

Fee for copies of opinions, $4.55.

[Endorsed:] File No. 19,874. Supreme Court U. S. October term, 1905 Term No. 372. The St. Mary's Franco American Petroleum Company, pl'ff in error, vs. The State of West Virginia. Certified copy of dissenting opinion of Judge Sanders in sup. court of appeals of West Virginia. Filed Oct. 21", 1905.

# FILE COPY.

Office Supreme Court U. S.
FILED
OCT 20 1905
JAMES H. McKENNEY,
Clerk

## BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

NO. [redacted]98

THE ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY, Plaintiff in Error.

vs.

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

SUBMITTED UNDER RULE 20, UPON STIPULATION.

(19,874.)

# No. 372.

IN THE

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1905.

THE ST. MARY'S FRANCO-AMERICAN PETROLEUM CO., PLANTIFF IN ERROR,

*vs.*

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

SUBMITTED UNDER RULE 20, UPON STIPULATION.

The State of West Virginia, Def't in Error,
*vs.*
St. Mary's Franco-American Petroleum Company, Pl'ff in Error.

Brief for Plaintiff in Error.

### STATEMENT OF CASE.

On the 18th day of January, 1902, the St. Mary's Franco-American Petroleum Company was incorporated under the laws of West Virginia. At the time it was incorporated, the following statutes were in existence:

Section 8 of chapter 53 of the code, which is as follows:

"Where the legislature has the right to alter or repeal the charter or certificates of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors of the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests."

Also section 24 of chapter 54 of the code, which is as follows:

"Every such corporation having its principal office or place of business in this State shall, within thirty days after organization, by power of attorney duly executed, appoint some person residing in the county in this State wherein its business is conducted, to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make such return for and on behalf of said corporation to the assessor of the county or district wherein its business is carried on, as is required by the forty-first section of the twenty-ninth chapter of the code. Every such corporation having its principal office or place of business outside this State shall, within thirty days after organizing, by power of attorney duly executed, appoint some person residing in this State to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make return of its property in this state for taxation as aforesaid. The said power of attorney shall be recorded in the office of the clerk of the county court of the county in which the attorney resides, and filed and recorded in the office of the secretary of state, and the admission to record of such power of attorney shall be deemed evidence of compliance with the requirements of this section. Corporations heretofore organized may comply with said requirements at any time within three months after the passage of this act. Any corporation failing to comply with said

requirements within six months after the passage of this act, shall forfeit not less than two hundred nor more than five hundred dollars, and shall, moreover, during the continuance of such failure, be deemed a non-resident of this state, and its property, real and personal, shall be liable to attachment in like manner as the property of non-resident defendants; any corporation failing so to comply within twelve months after the passage of this act, shall, by reason of such failure, forfeit its charter to the state, and the provisions of section eight, chapter twenty, acts one thousand eight hundred and eighty-five, relative to notice and publication, shall apply thereto."

Under this last mentioned statute the said corporation on the 17th day of February, 1902, by power of attorney duly and legally executed, filed and recorded, appointed William M. O. Dawson, who was then and has been ever since, and still is, a resident of the county of Kanawha in said state and living in the City of Charleston, the capital of said state, the latter being situated in said Kanawha county.

The said corporation has its chief works and business in the City of Lima and county of Allen in the State of Ohio, and it is therefore what is termed under the statutes of West Virginia, a non-resident domestic corporation.

On the 22nd day of February, 1905, the legislature of West Virginia passed an act known as chapter 39 of the acts of 1905, which act is as follows:

"Sec. 1. The auditor of this state shall be, and he is hereby constituted, the attorney in fact for and on behalf of every foreign corporation doing business in this state, and of every non-resident domestic corporation. Every such corporation shall, by power of attorney, duly executed, acknowledged and filed in the auditor's office of this state, appoint said auditor, and his successors in office, attorney in fact to accept service of process and notice in this state for such corporations, and by the same instrument it shall declare its consent that service of any process or notice in this state on said attorney in fact, or his acceptance thereof endorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said corporation.

Sec. 2. Such foreign or non-resident domestic corporation shall at the time of taking out its charter, or procuring its authority to do business in this state, as the case may be, pay to the auditor as its said attorney ten dollars for his services as such for the then current year ending on the 30th day of April next ensuing; and on or before the first day of May, for each year, such corporation shall pay to said auditor the like sum of ten dollars for his services as such attorney. And all such corporations as have heretofore taken out charters, or procured authority to do business in this state, shall for the fiscal year commencing on the first day of May, nineteen hundred and five, pay the sum of ten dollars to the auditor as the fee for such attorney to receive service of process, and annually thereafter a like sum, and such corporation shall not be required to pay any fee to the person who may have been heretofore appointed its attorney to receive service of process. All moneys received by the auditor under this chapter shall belong to the state, and be by him immediately paid into the state treasury. The auditor shall keep in a well bound book in his office a true and accurate account of all moneys so received and paid over by him.

Sec. 3. The post office address of such corporation shall be filed with the power of attorney, and there shall be filed with the auditor from time to time statements of any changes of address of said corporation. Immediately after being served with, or accepting, any such process or notice, the auditor shall make and file with said power of attorney a copy of such process or notice with a note thereon indorsed of the time of service, or acceptance, as the case may be, and transmit such process or notice by registered mail to such corporation at the address last furnished as aforesaid. But no such process or notice shall be served on the auditor or accepted by him less than ten days before the return thereof.

Sec. 4. In addition to the auditor, any such company may designate any other person in this state as its attorney in fact, upon whom service of process or notice may be made or who may accept such service. And, when such local attorney is appointed, process in any suit or proceeding may be served on him to the same effect as if the same were served on the auditor.

Sec. 5. Failure to pay the attorney's fee as hereinbefore required shall have all the force and effect, and subject such

corporation to the same penalties and forfeitures, as are or may be prescribed by law for failure to pay the license tax required to be paid by such corporation.

Sec. 6. Any corporation failing to comply with the provisions of this act in so far as it relates to the appointment of the auditor as its statutory attorney, within ninety days from its incorporation, shall forfeit one hundred dollars as a penalty for such failure, and upon failure to pay such penalty, the charter of such corporation shall thereby be forfeited and void."

On the 16th day of June, 1905, the State of West Virginia began these proceedings in the Supreme Court of Appeals of West Virginia, the object of which was to compel the said corporation to execute, acknowledge and file a power of attorney appointing the auditor of West Virginia and his successors in office the attorney in fact to accept service of process and notice in the State of West Virginia, for said corporation, and to compel it by the same instrument to declare its assent that service of process or notice on said attorney, or his acceptance thereof, should be equivalent to and should constitute due and legal service upon said corporation. The said corporation moved to quash the alternative writ of mandamus and also demurred to it, both upon the ground that the said act of the legislature of February 22, 1905, sought to be enforced herein, is null and void, because in violation of the Fourteenth Amendment to the Constitution of the United States. (See Record, page 4). On June 27th, 1905, the court overruled the said demurrer and motion to quash and granted a peremptory writ of mandamus as prayed for in the petition and alternative writ. (See Record, page 5). From this judgment of the Supreme Court of Appeals, the highest court in which the said case could be heard in West Virginia, this writ of error is prosecuted here. All of the foregoing facts are set out in the petition and alternative writ of mandamus, and therefore all of the matters of law arose upon the demurrer and motion to quash.

The Acts of the Legislature of 1905, chapter 36, section 124, page 388, define what a *non-resident domestic corporation* is. It first divides corporations into two general classes, to-wit, domestic and foreign. All corporations created under the laws of the State of West Virginia and certain ones created under

the laws of the State of Virginia prior to '63, are domestic corporations. Corporations created under the laws of any other state are foreign corporations. The domestic corporations are divided into two classes, resident and non-resident. *Resident domestic* corporations are those which have their principal place of business or chief works within the State of West Virginia *Non-resident domestic* corporations are those whose principal place of business or chief works is located without the State of West Virginia. These divisions and sub-divisions were for the purposes of taxation. Resident domestic corporations are charged so much per thousand on their maximum capital stock as a license tax; non-resident domestic and foreign corporations are charged a much higher rate per thousand upon their maximum capital stock as a license tax. The Act of February 22, 1905, however embraces all *foreign* corporations and all *non-resident* domestic corporations, and it is conceded that the plaintiff in error having its principal office in Ohio, is a non-resident domestic corporation, and comes under the provisions of section one of that act. This act, it is respectfully submitted, cannot be viewed by this court or any other court with the respect ordinarily due a solemn enactment of the legislature of the state. It carries on its face marks of crudeness, ignorance of fundamental principles, disregard of private right and a grotesque abuse of power which we venture to say has never before passed in review before this court. Section one first declares the auditor to be the attorney in fact for all non-resident domestic and all foreign corporations; it then requires the corporation to appoint the auditor by a regular power of attorney in which paper the corporation shall declare its assent and agreement that any process served upon the auditor shall be binding upon the corporation. The second section requires the corporation to pay the auditor ten dollars a year "for his services as such" attorney. The same section provides that "such corporation shall not be required to pay any fee to the person who may have been heretofore appointed its attorney to receive service of process." The court will see from this that the legislature of West Virginia wilfully and deliberately intended and attempted to violate the obligation of any contract which may have been entered into between the corporation and its attorney appointed theretofore under the provisions of sec-

tion 24 of chapter 54 of the code, or else did not know the meaning of chapter 54, sec. 24. Of course under the provisions of this last section, many corporations incorporated under the laws of West Virginia, (certainly this one) had selected and appointed by power of attorney some resident of West Virginia upon whom process could be served, and had some kind of a contract satisfactory to the attorney and the corporation for the payment of fees. The legislature of West Virginia evidently supposed that there was some statute in West Virginia compelling a corporation to pay an attorney's fee to any one appointed under the provisions of section 24 of chapter 54, and that it could repeal or set aside any such provision. This is inevitable unless we conclude that it deliberately and wilfully attempted to set aside and annul a private contract. Said sec. 24 requires only the appointment of an attorney and leaves the compensation, if any, to private contract.

Again: Notwithstanding the fact that section 2 requires the corporation to pay ten dollars to the auditor *for his services,* the act provides that this ten dollars shall be paid into the state treasury. The attention of the court is called to these absurd provisions, not so much to show their bearing upon the question involved here, but to illustrate and fortify the original statement, that the act is not entitled to the ordinary respect due a legislative enactment.

The plaintiff in error complains of the judgment of the court below because it upheld the validity of the said act of February 22, 1905, and enforced its provisions against the plaintiff in error, and this court will review and reverse the said judgment if the said act so upheld and enforced violates the Fourteenth Amendment of the Constitution of the United States. We contend that it does so in the following particulars:

1st. Because it deprives the plaintiff in error of its liberty and right to select its own attorneys and agents.

2nd. It denies to plaintiff in error the equal protection of the laws.

3rd. Its enforcement is calculated to deprive plaintiff in error of its property without due process of law; and

4th. It is a harsh, unjust and arbitrary piece of legislation, which violates natural justice and is clearly subversive of com-

mon right, so much so, that it is not saved by the reserved power of the Legislature to amend.

At the time of the original decision in this case, the Supreme Court of Appeals of West Virginia did not hand down a written opinion, and at the time this writ of error was granted, none had been filed; but recently an opinion agreed to by a majority of the court and a dissenting opinion by Judge Saunders, have been filed, to be published in the state reports, and as these are not in the record we file them now in justice to the Supreme Court of Appeals of West Virginia, and for the information of this court.

It will be seen that the opinion of the court below upholding the Act of February 22, 1905, is based solely upon the proposition that at the time the complaining corporation was incorporated under the laws of West Virginia, section 8 of chapter 53 of the code was in existence, which reserved to the legislature the right to alter or repeal any law relating to a corporation. The opinion does not defend the legislature against the charges that it deprives the corporation of the right of private contract or liberty of contract, and further, deprives it of the equal protection of the laws. The opinion brings to this court the point whether or not there is any limitation whatever to the power of the legislature in enacting laws concerning its own corporations, where at the time the charter was granted, there was a law reserving to the legislature the right to alter or repeal the laws concerning corporations.

1.

Corporations are persons within the meaning of the 14th amendment to the Constitution of the United States.

> Santa Clara vs. Southern Pac. R. R. 118 U. S. 394.
> 4. Thompson Corp. Sec. 5448.

Does not this act then deprive and deny to this corporation the equal protection of the laws?

The State of West Virginia creates two kinds of corporations, to-wit: *resident domestic* and *foreign domestic.*

*Resident domestic* corporations are those having their chief works within the State of West Virginia; *foreign domestic* are

those having their chief works outside of the state, like the plaintiff in error. Resident *domestic* corporations are not affected by the law under consideration. Those corporations are only required to appoint some one who is a resident of West Virginia, as required by section 24 of chapter 54, upon whom process can be served. Every stockholder of such corporation may be a citizen of any state or foreign country; none of the stockholders or officers are required to reside in West Virginia, or even hold a meeting in West Virginia. Therefore, there is every just reason why laws applicable to the one kind of corporation, should be applicable to the other; yet the resident corporation may select its own agent and attorney and make any sort of arrangement to have process quickly transmitted to it, but the foreign domestic corporation is deprived of the right of choosing its agent, and in addition, is required to pay ten dollars for his service, whether it needs or gets the service or not.

The reasoning of the majority opinion that the auditor of the state is liable upon his official bond, in case he fails to transmit the process to the corporation, is not convincing for two reasons:

1. Because compelling one class of corporations to resort to a suit upon an official bond for protection, and leaving to another class the right to attend to its own business in its own way, and provide its own safe-guards against surprise and fraud, is a discrimination against the former, and is a denial to it of equal protection. *Equal* does not imply nearly alike, it means that full measure of exactness, one thing with the other, as to satisfy an honest person, dealing fairly with both, that there is no advantage to the one nor disadvantage to the other.

2. The penalty of the official bond of the auditor is twenty thousand dollars; (code W. Va. ch. 10, sec. 12) therefore in a suit brought against this plaintiff in error, founded upon false suggestion for the sum of one hundred thousand dollars, a judgment by default might go without any process or notice being transmitted to the corporation, and the limit of its remedy against the auditor would be twenty thousand dollars. It is submitted that the remedy suggested by the opinion is therefore far below any standard of equal protection which could be justified by any fair interpretation of the 14th Amendment, which was designed to protect all persons against arbitrary and unjust legislation.

Another section (3) of this law undertakes to provide against one of its weaknesses by requiring that the post office address of the corporation shall be filed with the power of attorney, and "there shall be filed with the auditor from time to time, statements of any changes of address of said corporation." Who shall file these "statements?" The president, secretary, treasurer, a stockholder, or who? Why not a minority stockholder file such a statement of change of address, and thus innocently or collusively, cause the auditor to send the process not to the governing body of the corporation, but to a dissenting minority?

Again, the same section 3 requires the auditor to transmit any process or notice by "registered mail to such corporation at the address last furnished as aforesaid." Therefore, if the president, secretary and treasurer of the corporation should be in the state capitol at the time the process should be served upon the auditor, or should be in the auditor's office at the time, the auditor could discharge his official duties and relieve himself of his liability upon his official bond by depositing the notice in a registered letter addressed to the corporation "at the address last furnished" and could purposely omit to notify the governing officers. This law does not even make it the duty of the auditor to make a faithful and honest effort to see that the process reaches the corporation; it does not require him to change a specified line of conduct, even though he may know, that by following the statute, he would fail to get the process into the proper hands. If there be an address of the corporation on file in the auditor's office, and the auditor should know personally that the address is erroneous, he is bound to follow the direction contained in section 3, in order to discharge himself from liability upon his official bond. If the corporation should decide to remove its principal office to the capital of the state, and its president should reside at the capital, the auditor would discharge his official duty by mailing the process to San Francisco, California, if that should be the last address on file in his office.

The attempt in the fourth section to take the sting out of this law by allowing the corporation to appoint some other person, fails of its purpse. This section is useless and shows again how little the legislature knew of the statutes of the state, and in-

cidentally, of the rights of persons. It required no legislative act to authorize a corporation to designate a person, or appoint a person, to perform any duty for the corporation; but this law does not repeal section 24 of chapter 54 of the code, requiring all corporations, including this one, to appoint some one in the State of West Virginia upon whom process could be served. A corporation could appoint some one in every county in West Virginia, and still such appointments would not dispense with the requirements of sections one and two of the act in question. A corporation, such as the plaintiff in error, might have real estate in West Virginia, its president, secretary, treasurer and every director and stockholder might be a citizen and resident of the State of West Virginia, and it might, by power of attorney, under the provisions of section 24 of chapter 54 of the code, and of section 4 of the act in question, appoint some one in every county in the state upon whom process could be served, and still it would be required to appoint the auditor and agree that any process served upon the auditor, would be valid and legal process upon it; and with all these officers, and all these agents within the state, if this law be upheld, process so served upon the auditor, would be good.

Again, it will be noted that this act in question does not make the auditor the attorney for the corporations such as the plaintiff in error and make valid service of process upon him in the event that the corporation fails to comply with section 24 of chapter 54 of the code, as is the case in practically all of the states where statutes of this kind have been passed. Take for instance the case of Pinney vs. Loan and Investment Co., 106 Wis. 396. In that state the statute provided that until a domestic corporation files with the register of deeds, a list of its officers upon whom process may be made, service may be made by leaving a copy with the register of deeds. The court in that case held that even that statute was unconstitutional. The court will find that the statute in question here is unlike the statutes of any of the states which have attempted to make service of process upon an official or some designated person legal or due process. Without vouching all of them, we do assert that in a great majority of the states in which any such attempt has been made, it has always been done only as an alternative measure for securing service of process in the event that the corporation

fails to provide for itself a status in the state which will enable suitors to serve process upon it; and without burdening the court with reviewing these cases which will be cited by the state here, we make the general statement that nearly all of these cases are from states where the alternative is given to the corporation either to have its office in the state, or else to provide some one in the state upon whom process can be served, and the corporation failing in either of these particulars, is required to submit to service of process upon some designated official. In short, no statute except this one, has ever undertaken arbitarily to take away from a corporation its right to provide against accident, surprise, mistake and fraud, in an alleged attempt to secure to all persons having controversies with it, a fair and reasonable way to secure service of process upon it.

This law is almost, though not quite, within the opinion of the Supreme Court of Appeals of West Virginia, announced in State vs. Goodwill, 33 W. Va. 179. It certainly comes within the condemnation of that opinion as limiting the right of contract.

The attempt to put this legislation upon the ground of public safety or any other specious public aspect is, with all respect the merest pretense. This corporation has complied with section 24 of chapter 54 of the code. Within thirty days after its incorporation it appointed Hon. William M. O. Dawson, then, ever since and now, a resident and citizen of the capital of the state, and now the Governor of the state, as its attorney upon whom process could be served, and it did so by a solemn power of attorney, recorded in the office of the secretary of state and in the office of the clerk of the county court of Kanawha County, in which county is located the capital. Any corporation failing to comply with said section 24 is visited with penalties and could be proceeded against as a non-resident, and of course its charter could be forfeited for a continued failure. Therefore, when this law was passed, the plaintiff in error was in no default and every person having any sort of litigation with it could be reached by serving process upon Mr. Dawson at the state capitol, and the process so served would bind the corporation, because it had voluntarily filed a power of attorney agreeing and consenting that all process served upon said Dawson, should be due and legal process upon it. It is, therefore, a pretense that

there was any necessity for compelling this corporation to sign another power of attorney and to agree in it that any process served upon the auditor should be binding upon it. It is justified by no public necessity and is clearly that kind of legislation condemned in State vs. Goodwill, 33 W. Va. as sumptuary, and depriving a person of its right and liberty of private contract.

As was said in Mugler vs. Kansas, 123 U. S. 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty,—indeed under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of authority. If, therefore, a statute purporting to have been enacted to protect the public health, public morals or the public safety, has no real or substantial relation to those objects, or is palpably an invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Again, in Williams vs. Fears, 179 U. S. 274:

> "And as to the right to contract. The libertly, of which the deprivation without due process of law, is prohibited, means not only the right to be free from the mere physical restraint, &c., &c. Although it may be cited that this right to contract in relation to persons or property or to do business within the jurisdiction of the state, may be regulated and sometimes prohibited, when the contract or business conflict with the policy of the state as contained in the statutes."

This is paternal legislation as described in People vs. Gilson, 109 N. Y. 389.

In People vs. Warden, 157 N. Y. 116, the court says:

> "In discussing the constitutionality of the statute it is to be remembered that the question is to be determined not by what has been done in any particular instance, but what may be done under and by virtue of its authority. It is for the courts to determine what is due process of law, or what is the equal protection of the laws, and not for the legislature."

Lawton vs. Steele, 152 U. S. 133.
Allgeyer vs. La., 165 U. S. 578.

Again, as this court said in Yickwo vs. Hopkins, 118 U. S. 356:

> "Though a law be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal manner, so as to practically make illegal discrimination between persons in equal circumstances material to their rights, *the denial of equal justice* is still within the prohibition of the Constitution." (Our italics).

Cooley's Const. Lim. (6th Ed.) at page 484, puts the point thus:

> "The doubt might also arise whether a regulation made for one class of citizens entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment *should not have capacity to make contracts,* or to receive conveyances, or to build houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their "pursuit of happiness."

We desire to call the particular attention of the court to the real *gravamen* of our complaint here. The first section of this statute creates an attorney to accept process for his plaintiff in error. As a matter of law the auditor is designated the attorney for this corporation. If the law stopped there, there

would be some protection to this corporation; for, if the auditor failed to get notice to the corporation, either by neglect or design, then in any given case it would be a question for this court to determine whether or not the proceedings had been tantamount to due process of law, and there would be presented to this court the same question which was presented in Pinney vs. Loan Co., 106 Wis. 396, and in National Surety Co. vs. Bank, 120 Fed. 596. But this statute does not stop with that requirement, but goes forward and makes it a duty of this corporation, not only to appoint the auditor, but to *sign, execute, acknowledge and deliver a power of attorney*, in which power of attorney it is required to consent and agree that any process served upon the auditor, or accepted by him, would be valid and legal process upon the corporation; and the Supreme Court of Appeals of West Virginia, by its mandate, ordered and directed the plaintiff in error to execute and deliver such a paper. If this corporation shall make and execute such a paper, then it is bound by the terms of that paper, and it cannot hereafter contest or litigate in any case, whether or not any process so served upon the auditor is valid or binding upon it, no matter how unjust or wrong it might be in the given case. In Surety Co. *vs.* Bank 120 Fed. 596 the judgment obtained was set aside because the corporation had no notice and did not consent to the imposed agent. How could it make that defense after it had agreed in obedience to the writ of mandamus? The Supreme Court of Appeals of West Virginia has compelled it by mandamus to execute such a power of attorney, and if this judgment shall stand, it is bound to do so and forever tie its hands against contesting any fraud, accident or mistake in the service of process. Under this judgment it is compelled to select an agent and attorney against its will; to consent and agree that any process which may be accepted by this attorney or served upon him, shall be due and legal process upon it, which agreement, it is unwilling to make. When it commits itself, as it has done, to the agreement that any process served upon or accepted by a citizen of West Virginia, selected by it, shall be due and legal process upon it, and consents that it will be bound in all courts by such service or acceptance, it has gone to the limit of fairness and reasonableness. It is respectfully submitted, even pleaded to this court, that of all of the relations, existing between a per-

son natural or artificial, and its servants or agents, that of attorney is the highest; and among the duties to be performed by an attorney, the most solemn is that of accepting service of process for the client. A corporation may not be particular who shall be its secretary, or even treasurer or president, but it certainly would be particular and careful in the selection of a person to whom was committed the high prerogative of accepting process which would bind it in every court in the Union. If there be anything in the liberty of selecting agents and servants and in the right or liberty of contract, its exercise is demanded in selecting the person who shall bind the corporation as to the service or acceptance, of process. If the act of the legislature in question had required all citizens of the state over twenty-one years of age to file such a power of attorney as this, such an act would be confessedly void. Why? Because it deprives a person of a fundamentaly right. What is that right? It is the right to pursue his own business in his own way, to select his own agents, attorneys and servants and his liberty of contract. A power of attorney such as this is clearly a contract. In what respect then does this law applying to corporations, differ from such a law applying to natural persons? For every purpose involved here, this corporation is a person, and the equal protection of the laws is guaranteed to it as much as to the individual. Its vested rights of property and of dealing with its own, of selecting its own attorneys and agents, of fixing their compensation and of making its own contract, are protected by the fourteenth amendment, the same as if it were an individual. If the state can select an agent upon whom process may be served for a corporation, why can it not select its directors, its president, secretary and treasurer? Why not provide that the auditor of West Virginia shall be president of every corporation coming within the class named in section one, and prescribe and fix his duties and salary as such president? Why not provide that the auditor shall be the treasurer of every such corporation, and all moneys belonging to the corporation, shall be turned over to him and be by him disbursed in some way to be fixed by the statute?

This act is unjust and unfair for another reason. It allows the auditor to *accept* service of process for a given class of corporations. This is so manifestly wrong and contrary to funda-

mental principles, as to take it without the realm of discussion. A corporation may desire to contest the jurisdiction of the court; it may want to contest under the statutes of West Virginia, the forum in which it may be impleaded; it may desire to object to the service of process at the particular time and in the particular way, and yet, under this law, the auditor has the right to accept service of process, and thus may deny to the corporation the right to contest many questions, because the process in the case has been, without its knowledge or its consent, accepted by an agent forced upon it by the state. To the auditor, the agent imposed upon the corporation, is given the right to even accept service of process, although the corporation may desire and request him not to do so. The corporation's defense may be materially affected by an acceptance and it may beg the auditor not to accept, but still the auditor can do as he pleases. In other words, the agent as attorney is beyond the control of the principal or client. The basis of agency is consent, and control of the agent by the principal. 120 Fed. 596. (See cases cited, page 597).

Again, the auditor is compelled to send the process by registered mail. The court knows that the limits of the United States of America are such now, that ten days may be insufficient time in which to transmit by registered mail a letter and allow any sort of arrangement made for the defense. The corporation may have its principal office in Manila, or Honolulu, or San Francisco; Skagway or Dawson City are entirely within the probabilities, as many corporations of West Virginia are incorporated for developing gold in Alaska. With these possibilities and probabilities present, the legislature of West Virginia selected the most ponderous and sluggish manner for transmitting process to the principal, to-wit, by registered mail; and has provided a means for bringing home to the corporation, knowledge that process has been served upon it, the slowest and most inadequate of all. Process may be served upon this plaintiff in error now, and the agent of its own selection can telegraph, write or telephone, and use all means in his power to have the principal notified and a proper defense made. If this act shall be upheld and process should be served upon the auditor, he can do nothing but transmit the process by registered mail, and if the corporation gets it,

well and good; if it does not, the auditor is relieved from liability and process has been legally served upon the corporation. But all of the foregoing is practically admitted and conceded by counsel for the state, and it is not denied nor controverted in the opinion of the court. The act in question is justified by the Supreme Court of Appeals of West Virginia, solely upon the ground that the reserved power to alter or amend, gives the state the right to pass this law.

2.

Is there any limitation to the power of a state in dealing with its own corporation, if, at the time the corporation was created, there was a statute of the state reserving to the legislature the right to alter or repeal? We do not deny that in dealing with the corporation, as to all matters concerning their government, holding meetings, their power to dispose of their property and the manner of doing so, and generally all matters pertaining to the business and management of the corporation, all persons do so with the knowledge that the right to alter or repeal is present. But the opinion of the court below proceeds upon the theory that there is no limit to this power of the legislature. This position we controvert.

In Shields vs. Ohio, 95 U. S. 319, this Court said:

> "The power of limitation and amendment is not without limit. The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."

If the vested rights of property of corporations are inviolable, why shall not the same be said of the liberty of contract, of the inherent liberty and right attaching to every corporation and the granted right to select its own agents and employees and to contract only as it may see fit? How can it be said that the vested rights of property are more sacred than the inherent,

natural right of liberty of contract and liberty of selecting agents to be entrusted with the highest and most solemn duties or powers that can be delegated? But the laws of West Va. vest the power to select agents in a Board of Directors. Code W. Va. ch. 53, sec. 53. And the manner of their election is fixed by the State Constitution. Const. W. Va. Art. XI, sec. 4. The Board of Directors is subject to the orders of the stockholders. Code W. Va. ch. 53, sec. 55. These statutes inhered into the original grant and have not been repealed. Therefore this act takes away, not only a fundamental right, but one granted in the original charter and without which the corporation could not transact business.

Again, in Lothrop vs. Stedeman, 13 Blatch. 134, this court said:

> "Where a charter or statute provides that such charter is subject to repeal by the legislature, at its pleasure, without limitations or conditions limiting the power of repeal, the legislature has the right to exercise its powers summarily and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by the courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and in such a case, a repeal, like other legislative acts which do thus violate the principles of natural justice, may be reviewed by the courts."

We respectfully submit, that if this act does not "wantonly" and "causelessly" violate the principles of natural justice, it would be hard indeed to imagine a case wherein those principles are violated. We have endeavored to show that the legislation is needless and without cause, for the reason that this corporation already has an agent and attorney and a legal status in West Virginia, and any process which could be served upon the auditor, can now be served upon a duly authorized agent and attorney of this corporation, to-wit, the distinguished Governor of the state. If compelling a corporation to enter into a contract against its will, compelling it to consent against its will, compelling it to accept an agent or attorney against its will and compelling it to pay a fee to that attorney against its will, does not violate principles of natural justice, then we are at a loss to understand those principles.

In upholding this legislation as an exercise of the right to amend and alter the laws concerning corporations, the court below said:

> "In this instance the state has simply amended the law as to the appointment of an agent; has only made a public officer attorney, so that there be one particular person at a fixed place always to be found and known to all to be the attorney, dispensing with the inconvenience and uncertainty of ascertaining persons for service."

We respectfully take issue with this statement and assert that section 24 of chapter 54, which was the law concerning the appointment of agents to accept process, was not amended at all; every corporation is still compelled to appoint some one in West Virginia under the provisions of this section, and every corporation in West Virginia, coming within the purview of section 24 of chapter 54, is still bound to comply with it or suffer the penalties thereby imposed. And under its provisions, there could be no *uncertainty* or *inconvenience* because the power of attorney is recorded in the office of the Secretary of State and in the County Clerk's office. The law under discussion does not pretend to *amend the old law* but leaves it just as it was. The old law provided the manner by which the corporation shall and must select its agent; the new law takes this power away from the corporation in regard to one of its agents, and compels the corporation to confer all powers concerning process upon this agent. But section four expressly allows a corporation to appoint anyone else. If section four had gone further, and had provided that when the corporation shall so appoint someone else, and should notify the auditor, then the powers of the latter should cease, there might be some excuse for the law, and some pretense that the object of the law is to secure service of process in a fair and reasonable manner.

In the opinion of the court below are cited various cases from a work on the 14th Amendment from the pen of the distinguished judge who rendered that opinion. Brannon's 14th Amendment, page 365.

One of the cases there cited is Holyoke vs. Lyman, 15 Wallace, 500. On page 519, the court says:

> "Vested rights it is conceded cannot be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public, of the incorporators or to promote the due administration of the affairs of the corporation."

How can a corporation carry on the business for which it was incorporated, or carry out "the original purposes of the grant," if it is denied the right to choose its own agents? When once it is conceded or held that the power to alter or repeal is without limitation, in the particulars in question here, then the State may impose any agent upon the corporation. A lawyer to carry on the oil business, is no more shocking than would be a layman to determine when to accept or not accept, process. If the power of the state to impose agents upon the corporation be unlimited, then the power may be so used as to hinder or prevent the carrying out of the "original purposes of the grant."

The cases cited from this court in the opinion do not contravene this doctrine. In other words, while it is true that the act reserving to the legislature the right to amend, alter and repeal is written into every charter, it must not be forgotten that the Constitution of the United States is also written into it; and the alteration or amendment must not violate the Consitution. We are aware of the decision in Bank v. Owensboro, 173 U. S. 636. But that case only held that a contract relation could be violated under the reserved power. What the state *gave* it reserved the right to take away. It gave the exemption from taxation to the corporation; and when it did so, it reserved the right to withdraw it. But the state did not give this corporation its right to the equal protection of the laws and its right to choose its own agents and make its own contracts. No state has the power to create a monstrosity, a thing implying principal and agent, with no power in the principal to choose or direct. The power to amend or repeal implies the restoring of the corporation to its condition before the grant was made, but does not imply keeping it in existence with the stockholders' money, at the mercy of unequal conditions, with no option to do business as a free agent or dissolve corporate existence.

The sole question here is whether or not the liberty of contract, the right to choose one's agent or attorney and the right to fix the compensation for his services, are rights guaranteed under the Constitution of the United States to all persons, whether natural or artificial; and whether or not the state can compel a corporation which it has created, to sign a contract which it does not desire to sign, under the specious pretense that it has reserved the right to alter or repeal its charter. The court below does not even allow it to refuse acceptance of the law. Its mandamus is unconditional.

3.

There is another objection to this law, that is that the statute fixes a tax upon this corporation for a private purpose and not for a public purpose, and in so doing, deprives this corporation of its property without due process of law.

The second section of the act requires every such corporation to "pay to the auditor as its said attorney ten dollars *for his services as such* for the then current year, &c." The 2nd section requires it to pay on May 1st, "the sum of ten dollars to the auditor *as the fee for such attorney.*" We understand it to be well settled that all taxation shall be for public purposes.

Brannon 14 Am. page 160.
Cole vs. LaGrange, 113 U. S. 1.
Loan Ass'n vs. Topeka, 20 Wallace 665.

How can it be said that this ten dollars fee is for a public purpose, or for any public service which the auditor may render, when the statute says that it shall be charged *for his services as such attorney?* The state has no public duty to perform regarding the private controversies of corporations, and has provided no machinery for furnishing attorneys or agents for persons or corporations; and all of these things are without the purview of legitimate public functions. Services as attorney for a private individual or corporation do not come within the purview of the services of a secretary of state, auditor, clerk of a court, sheriff or other public official having duties to perform for which he is entitled to fees. Such fees could probably be required to be paid into the state treasury; but when an individual or corporation pays such fees, he is paying for public

services and services which are required to be performed by public officers, and fees for this kind of service, partake of a public nature. The state can probably require that such fees shall be paid into the state treasury and the officers be paid salaries. But services as attorney are private in their character, and this statute recognizes that they are private and designates them as *services as such attorney.* If this law shall be upheld, why cannot the state require that the auditor shall furnish counsel for such corporations, to defend the suits, and shall charge not less than one hundred nor more than five thousand dollars for such services, one-half of which shall be paid into the state treasury and one-half to the attorney doing the work?

Again, if the state can compel this corporation against its will to pay ten dollars to the auditor for his services as attorney, why not make the fee a hundred dollars or one thousand dollars? If the reserved power of the state goes to the extent of allowing the legislature to select the agent, make the contract, prescribe the terms of the contract, fix the fee and make the corporation pay it, all against its will, what limitation is there upon the amount of the fee or the kind of service for which it shall be paid? What limitation is there upon the person who shall be designated to do the service? The fact that the auditor is a public official, takes away none of the sting of this enactment; the legislature could as well require the duty to be performed by a sheriff, notary public, county clerk, justice of the peace or constable. Indeed, if it be held that there is no limit to the power of the legislature under the reserved right claimed here, then the individual to be selected, need not be a public official, but may be a private person. If there be no limitation upon the legislature the enormity of the act will not violate it; but if there is a limitation, it is the constitutional one contended for, and any violation of the constitution is void.

In its opinion the court below says:

> "The auditor is paid by the state, and the state by its officer, renders valuable service to the corporation."

We respectfully take issue with this theory, even if the inference intended were sound. The act does not alone require the corporation to pay the auditor for services rendered, but it requires

the corporation to pay for services before rendered and for services which may never be rendered. Each year the ten dollars is to be paid in advance for the year ending on the 30th day of April. If the corporation be incorporated in June, it then pays ten dollars for services for the year ending on the 30th day of April thereafter, and then on the following first day of May, it pay ten dollars for services for the next year, and so on; and if the corporation is never sued, the auditor will never render any service. In other words, this is an arbitrary exercise of power, imposing a tax for private services, whether performed or not, whether needed or not. One corporation may require services worth many hundred dollars; another may require no service. Yet both are required to pay the same; and we are told that the state, through its officer, is performing valuable service for both. If the law charged so much for each process served or transmitted, there would some attempt at fairness, and some grounds for likening the case to that where fees are charged and covered into the treasury.

> The case of Charlotte vs. Gibbs, 142 U. S. 385, and People vs. Budd, 145 U. S. 175,

are not determining upon this case. In the South Carolina case, (142 U. S. 386) the tax upon railroad corporations was made for the purpose of meeting the expenses and salaries of railroad commissioners. Railroad corporations were held to be in a sense public corporations, having public duties to perform. In the language of the court:

> "Though railroads are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public."

In the case of People vs. Budd, 145 U. S. 175, the act in question required electrical companies to pay the salaries of subway commissioners, upon the ground that it was in the exercise of the general police powers of the state. The distinction therefore betwen those two cases and the one here is apparent. Here is a strictly private corporation; the subject matter of the act in question does not relate to the health or morals, the safety or happiness of the public in any way. The corporation has no public functions to perform and the act relates to nothing

which could in any way be considered from the stand-point of the police power. From every corporation, like this, without cause or reason, and certainly without any necessity, the legislature requires an arbitrary fee of ten dollars a year for services which may never be rendered. It is an arbitrary payment or tax by the year, and it is for private purposes for private services, and so expressed on its face, and it would be a most extreme construction to say that a tax is for a public purpose when the act itself says that it is for a private purpose and when the court can see that the services to be rendered are in every way private.

4.

The point was made in the court below, that this act impairs the obligation of the contract which had before been entered into between this corporation and its attorney appointed under the provisions of section 24 of chapter 54. The opinion of the court below dismisses this point with the statement that that question does not arise here because it is between different persons, and further that that provision is separable from the clause requiring the corporation to appoint the auditor, and cites 26 Am. and Eng. En. of Law, 2nd Edition, 570, as authority for this position. The authority quoted lays down the well settled rule that when two provisions are so inter-dependent that one may not stand without the other, or so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other, and one provision is unconstitutional, the whole must fall; but where the unconstitutional portion can be stricken out, and that which remains is complete within itself, then the unconstitutional portion may be stricken out and the constitutional portion enforced. Adopting this rule, the legislature has said that a contract which the plaintiff in error entered into with Mr. Dawson, shall be abrogated or annulled, and it says so in terms. We may say, in passing, that when a legislative enactment will deliberately do this, we may not be surprised at what may follow. It then fixes a fee of ten dollars to another person, thus attempting to put resident domestic corporations and foreign domestic corporations upon the same footing, the former it

being supposed, having a private contract and probably fixing ten dollars as the minimum it would pay anyone. The foreign corporation having an enforced or involuntary contract with the auditor to pay the latter ten dollars, if the contract with the present attorney, Mr. Dawson, is not set aside, then the latter can recover whatever his services may be worth, or whatever was agreed upon in the contract which the legislature has annulled; thus this corporation would be compelled to pay Mr. Dawson and ten dollars in addition to the auditor. Now is it not clear that the legislature intended that these two provisions should go together? That is, that it would annul the present contract and substitute a new one? It will be conceded that the attempt to annul the present contract is abortive. Now is it to be supposed that the legislature intended that the new contract to be involuntarily entered into by the corporation, and the old contract should both stand? Is it to be presumed that the legislature intended to compel the corporation to enter into the new contract, unless it could relieve it of the old? It is clear that the legislature thought that under section 24 of chapter 54, a fee is required to be paid to the attorney, and it deliberately intended and attempted to set aside what it supposed was a provision of law for the payment of a fee for private services, and this is apparent from the whole act.

But we are contented to rest this case upon the following broad propositions:

1. That the act of the legislature in question, deprives this corporation of its liberty to choose its own agents and attorneys, and its inherent right to make its own contracts and employ its own attorneys and agree upon the compensation to such attorneys; and that any statute which violates these fundamental rights, violates the 14th Amendement to the Constitution of the United States.

2. That the reserved power of the legislature does not go to the extent of empowering the legislature to violate the Constitution of the United States, and that when the legislature passes a law relating to a corporation which palpably and openly violates the principles of natural justice, invades vested right and denies to the corporation the equal protection of the laws, it is void, whether it be done under the pretense of amending a law relating to corporations or otherwise.

3. That the tax of ten dollars upon this corporation is not for a public but for a private purpose, and thereby deprives this corporation of its property without due process of law; and inasmuch as it is attempted to equalize this corporation with others created under its laws, by declaring that it shall not pay its former attorney, hereby violating the obligation of a contract, the further effect will be to make double exaction from this class of corporations. These provisions are all interdependent and must be considered together.

We therefore respectfully submit, that the legislation in question is not only paternal and sumptuary, and an unwarranted meddling with private affairs, but it is a needless and wanton subversion of private right and liberty, antagonizing every principle of natural justice, alike a pioneer and a curiosity in legislative attempts to destroy vested rights and override ancient safeguards, and an arbitrary, harsh and unreasonable exercise of governmental powers, clearly within the ban of the 14th Amendment.

We therefore respectfully submit that this court has jurisdiction to review the judgment of the court below and ought to reverse it.

Respectfully,

W. E. CHILTON,
*Of Counsel for Plaintiff in Error.*

CHILTON, MACCORKLE & CHILTON,
*Counsel.*

Office Supreme Court
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JAMES H. M'KENNEY

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BRIEF FOR DEFENDANT IN ERROR.

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

No. [redacted]2. 98

THE ST. MARY'S FRANCO-AMERICAN PETROLEUM COMPANY,
Plaintiff in Error.

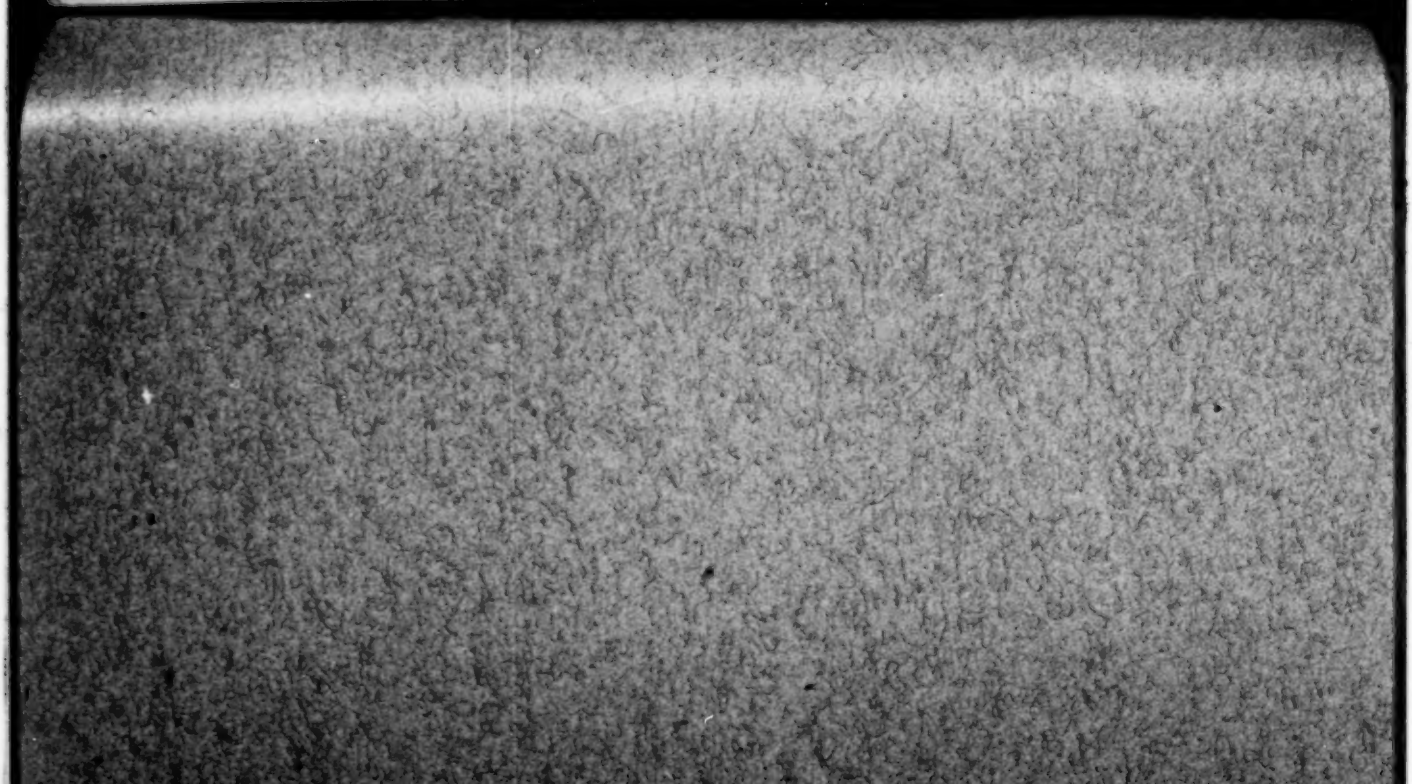
vs.

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

SUBMITTED UNDER RULE 20, UPON STIPULATION.

(19,874.)



# No. 372.

IN THE

# Supreme Court of the United States.

## OCTOBER TERM, 1905.

THE ST. MARY'S FRANCO-AMERICAN PETROLEUM CO., PLAINTIFF IN ERROR,

*vs.*

STATE OF WEST VIRGINIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

SUBMITTED UNDER RULE NO. 20 UPON STIPULATION.

## BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA, DEFENDANT IN ERROR.

The St. Mary's Franco-American Petroleum Company is a West Virginia corporation incorporated under the general laws of the State of West Virginia in force on the 18th day of January, 1903, and is what is known as a non-resident domestic corporation; in other words, it has its chief office and principal or chief works outside the State of West Virginia in which it was incorporated.

In 1902, when the company was incorporated, section 8 of chapter 53 of the Code, which is as follows:

> "Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors of the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests,"

was in force, and section 24 of chapter 54 of the code, which provides that:

> "Every corporation having its principal office or place of business outside this state shall, within thirty days after organizing, by power of attorney duly executed, appoint some person residing in this state to accept service on behalf of said corporation upon whom service may be had of any process or notice, and to make return of its property in this state for taxation as aforesaid,"

was also in force. Under this statute, the St. Mary's Franco-American Petroleum Company had, by power of attorney duly executed appointed Wm. M. O. Dawson its attorney in fact, and filed and recorded such appointment.

The legislature of the State of West Virginia, on the 22nd day of February, 1905, passed an act known as chapter 39 of the Acts of 1905, which act among other things, provides that:

"The Auditor of this State shall be, and he is hereby constituted, the attorney in fact for and on behalf of every foreign corporation doing business in this state and of every non-resident domestic corporation. Every such corporation shall, by power of attorney, duly executed, acknowledged and filed in the auditor's office of this state, appoint such auditor and his successors in office, attorney in fact to accept service of process and notice in this state for such corporations, and by the same instrument it shall declare its consent that service of any process or notice in this state on said attorney in fact, or his acceptance thereof endorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said corporation.

"Sec. 2. * * * * And all such corporations as have heretofore taken out charters, or procured authority to do business in this state, shall for the fiscal year commencing on the first day of May, nineteen hundred and five, pay the sum of ten dollars to the auditor as the fee for such attorney to receive service of process, and annually thereafter a like sum, and such corporations shall not be required to pay any fee to the person who may have been heretofore appointed its attorney to receive service of process. All moneys received by the auditor under this chapter shall belong to the state, and be by him immediately paid into the state treasury. The auditor shall keep in a well bound book in his office a true and accurate account of all moneys so received and paid over to him.

"Sec. 3. The postoffice address of such corporation shall be filed with the power of attorney, and there shall be filed with the auditor from time to time statements of any changes of address of said corporation. Immediately after being served with or accepting, any such process or notice, the auditor shall make and file with said power of attorney a copy of such process or notice with a note thereon endorsed of the time of service or acceptance, as the case may be, and transmit such process or notice by registered mail to such corporation at the address last mentioned as aforesaid. But no such process or notice shall be served on the

auditor or accepted by him less than ten days before the return thereof.

"Sec. 4. In addition to the auditor, any such company may designate any other person in this state as its attorney in fact, upon whom service of process or notice may be made or who may accept service. And, when such local attorney is appointed, process in any suit or proceeding may be served on him to the same effect as if the same were served on the auditor.

"Sec. 5. Failure to pay the attorney's fee as hereinbefore required shall have all the force and effect, and subject such corporation to the same penalties and forfeitures as are or may be prescribed by law for failure to pay the license tax required to be paid by such corporation."

The plaintiff in error, hereinafter for brevity called the St. Mary's Company, failed and refused to execute the proper power of attorney as required by the Acts of 1905, and on the 16th day of June, 1905, the State of West Virginia began proceedings in the circuit court of appeals of West Virginia to compel the said corporation to comply with the requirements of the statute, and by stipulation between the parties to said proceeding, all matters were submitted to the court for final determination upon the demurrer to the petition filed by the state for a writ of mandamus. (Record page 1.)

The grounds on which the St. Mary's Company sought to avoid the complyment with the statute of 1905, were that the same was in violation of the bill of rights of the State of West Virginia and of the constitution of said state, and that it was also in violation of the Fourteenth Amendment to the Constitution of the United States.

Upon argument, the Supreme Court of West Virginia decided that the provisions of chapter 39 of the Acts of 1905, requiring corporations to appoint the auditor as attorney to accept service of process and notice, was not unconstitutional.

The opinion of President Brannon, which was concurred in by all the Court except Judge Sanders who filed a dissenting opinion, was as follows:

"By chapter 39, Acts 1905, the State auditor was constituted the attorney in fact for every foreign corporation doing business in this state, and for every non-resident domestic corporation, and every such corporation is required, by power of attorney duly executed by it, to appoint the auditor its attorney in fact to accept service of process and notice in this state for it, and by the same instrument to declare its consent that service of any process or notice in this state on said attorney, or his accepting, shall be equivalent to and shall be, due and legal service upon the corporation. The act requires the corporation to pay yearly ten dollars to the auditor for acting, to be turned into the treasury by him. The defendant refusing to execute such power of attorney, the State asks a mandamus to compel it to do so. The corporation asserts that no duty rests upon it by reason of said act, because it is unconstitutional. The corporation says that the act denies it freedom of contract, freedom of choice of its agent, compels it to pay money, deprives it of property without due process of law, contrary to both state and Federal constitutions. We cannot concede this. We shall not discuss the general power of a state over corporations taking charters under it, of foreign corporations coming to the state by its grace to do business in it. It might be plausibly said that a foreign corporation, or a non-resident domestic corporation, having no office or officers in this state, the State, under power to regulate corporations, and particularly to see to it that judicial process to answer suits by proper means be made available, has the power assumed in the statute. It is a duty, and must be a legitimate power, that the State render effective the jurisdiction of its courts against corporations accepting its charter and doing business in the State, or chartered by another state and doing business in this State, but having, perhaps, no officer to be readily found in the State. We can see how often the service of process, without which court procedure would be ineffectual and not due process, may be delayed, or be inconvenient or be frustrated; and we can see how the state must have wide power in such case to secure service of the process of its courts, so its legislation do not deprive the just right of the cor-

poration. It ought to answer suitors in the courts. If the statute deprives the corporation of an essential right, its action would not be held good; but what right does this act take away? If the auditor were clothed with discretion to do an act harmful to the corporation, complaint might be justly made; but the auditor does nothing but accept service, a mere ministerial act. He does not confess judgment, nor does he do any discretionary act. Doubtless if he fail to warn his corporation of the suit, he would be liable on his bond just as to any person for failure to perform a legal duty. Before the Act of 1905, the code required a corporation to appoint such attorney. This act changes this so far as to make the auditor such attorney, thus taking from it the choice of person, sometimes a valuable right, but in this instance not so.

"But whether but for section 8, chapter 53, Code, this act would be valid, we need not, do not say. That section reads thus: 'Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company.' When the defendant obtained its charter, that section was in force, and this charter is subject to it. Under such a reservation of right, either to amend a charter, or to change the law regulating it, there is no limit to legislative power. It even includes right of repeal. In this instance the State has simply amended the law as to the appointment of an agent; has only made a public officer, attorney, so that there be one particular person, at a fixed place, always to be found, and known to all to be the attorney, dispensing with the inconvenience and uncertainty of ascertaining persons for service. 7 Am. & Eng. Enc. L., 2nd ed., 671; Citizens' Bank vs. Owensboro, 173 U. S. 636, and other cases cited in Brannon's Fourteenth Amendment, 365. When a charter issues under such law, the State has this right of amendment of the law in force before the charter; it is a condition of the charter

as fully as if that right were in words in the charter. The law inserts or reads it into the charter. 10 Cyc. 1087; Cross vs. Railroad, 35 W. Va., 177. If the corporation do not see proper to conform to it, it must discontinue business, as the legislature cannot force it to do business under the change. Yeaton vs. Bank, 21 Gratt., 593. It cannot be said that the 14th Amendment is violated because the act discriminates, requiring certain corporations, and not others, to appoint the auditor. As to domestic corporations having offices and officers in the State, on whom service of process can be had there is no need of such a statute but as to those not so situated, there is need. The classification is based on the reason of their being differently circumstanced, and this justifies such discriminating classification. Copper Co. vs. Scherr, 50 W. Va., 533; McGown vs. Illinois, 170 U. S., 283. As to the exaction of ten dollars for the service of the auditor. If this appointment is valid, this feature cannot render the statute invalid as taking property without due process. The auditor is paid by the state, and the state by its officers, renders valuable service to the corporation. South Carolina instituted a commission for regulation of railroads, and required the company to pay salaries of its members, on the theory that the state had power of regulation and the service redounded to the benefit of the railroad company. The act was held not to violate the 14th Amendment either as taking property without due process of law, or as denying the company the equal protection of the law. Charlotte Co. v. Gibbes, 142 U. S., 386. To the same effect, People v. Budd, 145 U. S., 175. That feature of the act providing that the corporation shall not be required to pay any fee to anyone who may have been before appointed such attorney, was mentioned in oral argument as violating the constitution in impairing the obligation of contract. That does not arise in this case. It is a matter between different persons. Further, that is a provision separable from the clause requiring the corporation to appoint the auditor, and if unconstitutional, would not touch or infect that provision. 26 Am. & Eng. Enc. Law, 2nd Ed., 570."

From this ruling of the court the St. Mary's Company has sued out a writ of error in the Supreme Court of the United State to the Supreme Court of Appeals of West Virginia.

The errors assigned by the St. Mary's Company are fully set out in the assignment of errors found on pages 9 and 10 of the printed record and are divided into five heads, but virtually they are all reduced to the one question, namely, that it was error in the Supreme Court of the West Virginia to hold that the act of the legislature in question, passed February 22nd, 1905, was not contrary to the Fourteenth Amendment to the Constitution of the United States, and while there is something said in the brief filed by attorneys for the St. Mary's Company as to the act in question impairing the obligation of contract and as being in violation of Section 10 of Article 1 of the Constitution of the United States, that question, we think, does not really arise in this case, nor can it be held in violation of the contract because of the reserved power of the legislature to alter, change or repeal the laws relating to corporations in force at the time the St. Mary's Company was organized.

As far as the same would exonerate the St. Mary's Company from paying anything for attorney's fees after the passage of the act to Wm. M. O. Dawson, that would only arise in a proceeding between the company and its said attorney; not between the state and the corporation.

We therefore take it that the only question submitted to this Court for its decision and determination is whether or not the statute in question deprives the St. Mary's Company of its property without due process of law or denies to it the equal protection of the laws as provided by clauses three and four, section one of the Fourteenth Amendment of the Constitution.

## ARGUMENT.

The sole question, as we understand this case at bar, for this Court to consider, being whether or not the act of the legislature

complained of is unconstitutional, the question as to the expediency, necessity or fairness of the statute, might, under the well settled rule, be left for the legislature to determine, and for the Supreme Court to decide whether or not it was in conflict with the constitution and laws of the state, or unjust and discriminative against the corporations legislated against; but, inasmuch as the able counsel representing the St. Mary's Company have devoted the greater part of their brief to the alleged iniquity of the act complained of, it might be advisable for the state's attorneys to call the attention of this Court to the effect of the statute, and we feel confident that the more carefully the statute is examined with reference to the circumstances under which it was enacted, the more fully will this Court becomes convinced that there is no error in the decision of the Supreme Court of West Virginia in sustaining the validity of the statute, and that the alleged injustice claimed by the attorneys for the plaintiff in error as having been perpetrated upon the corporation by the act will be found, in fact, to have no existence.

As the law was at the time of the incorporation of the St. Mary's Company, section 8 of chapter 53 of the Code reserved to the Legislature the right to alter or repeal any law applicable to such company; and at that time section 24 of chapter 54 of the Code requiring corporations to appoint some person residing in some county in the state as their attorney in fact on whom service of process could be made, was also in existence, and under this provision the selection of the individual to act as attorney in fact for a corporation being left to the corporation, it could select any person it chose residing in any county in the state however remote from the business centers or where the corporation was engaged in business, and upon filing the power of attorney in the office of the Secretary of State designating such person as attorney in fact, and having the same recorded in the office of the clerk of the county court of the county in which the agent or attorney in fact nominally resided, it had fully complied with the law.

With the law in this condition, parties dealing with a corporation would frequently be at loss to ascertain who was the attorney in fact because there was no provision for recording the power of attorney in the office of the Secretary of State, being merely filed therein; and when after search it was learned who was the attorney in fact on whom process could be served, it frequently happened that the person appointed as such attorney was not to be found in the county in which he nominally resided, being either absent on business or pleasure, and the situation frequently amounted to a denial of that speedy justice which it is the duty of the courts to afford its citizens against corporations of other states coming into the State of West Virginia, or those corporations which, being created, as it were, with a roving commission, had their principal office or chief works outside of the state.

The right reserved under this statute to alter the law in respect to service, being, as we take it, and as shown by the authorities hereinafter cited to be, established beyond controversy, the legislature sought to protect the rights of its citizens and those having business dealings with corporations, by designating an officer of the state and his successor in office, who had an established office where he could at all times be found in person or by deputy, at the capital of the state, as a proper person to be appointed attorney in fact by all foreign and non-resident domestic corporations, thus giving to all persons the knowledge that the auditor at the captal of the state was the attorney in fact on whom service of process could be had.

In other words, this gave to the attorney in fact, not only a name, but a known local habitation, and it then became necessary in the opinion of the Legislature of West Virginia to protect the company which appointed the auditor from the effect of service on the auditor as attorney in fact, of which the corporation itself might not be fully advised, and for that purpose, it required the corporation to first file with the auditor the postoffice address of the company and

its principal office or place of business, and in case any change was made, to immediately notify the auditor of such change; and, upon service being made upon the auditor, he was required to immediately forward the original process served upon him to the office of the corporation as per its postoffice address on file, and make a copy of the process and retain the same in his office, and enter upon a book in his office a record or memorandum, showing the date of service and the character of the process served, which book is kept open to the inspection of the public; and then, being an officer of the state under heavy bond, he would be liable for any violation of this imposed duty the same as for other duties pertaining to his office.

Again, under the old law, when the attorney in fact was finally found, he could be served with notice upon the evening of the very day on which the return was required. To protect the rights of the corporation, under the new statute this was changed, and no service is now valid unless served ten days before the return day in case service is made upon the auditor. In case, however, the corporation desires to retain its original attorney in fact, service upon him can be made in the manner provided by the general law. For these extra services imposed upon the auditor, and for the security given the corporations in case of service upon him, the corporations affected by the act were required to pay to the auditor ten dollars ($10.00) per year, being in its nature, a tax or license upon foreign corporations desiring to do business in this state, and non-resident domestic corporations doing business outside of the state.

No unreasonable or unjust duties are placed upon the corporation when it is taken into consideration that the legislature, by well settled rules, had a right to impose such terms upon foreign corporations coming into the state to do business as it saw fit, or bind the corporations of its own creation to such rules, regulations and requirements as might be deemed advisable before granting the charter, or afterwards where not contrary to the general laws of the state in such matters.

As a further security to the corporations affected by the statute from failure of service, the State of West Virginia, following the general trend of decisions in cases of that sort, has uniformly held that where a corporation is required to appoint a special statutory agent in the operation of its business, and it exercises due precaution in appointing a competent man for such office, and such agent is negligent in the performance of his duties, the company is not liable or responsible for such negligence, as is notably the case where skilled miners are required to be appointed as mine superintendents or bosses, and after such appointment by their negligence injuries occur to the employees of the company; in all such cases the company appointing the agent, is exonerated from all liability for the fault of the agent so appointed. See case of Williams v. Thacker Coal & Coke Company, 44 W. Va., page 599, 30 S. E. 107, and it is but fair to presume that should the question ever arise in the State of West Virginia upon this statute, the West Virginia courts will follow the rule of the Circuit Court of Appeals for the Eighth Circuit in the case of National Surety Company v. State Bank, 120 Fed., 593, and hold that the failure of an officer of the state, whom a foreign corporation, compelled by the statute of the state, has appointed as their attorney in fact to accept service of process, as a condition of doing business in the state, to comply with the statute requiring him to send the summons to the defendant to whom it is directed, immediately upon its receipt, is not such failure or negligence upon the part of the defendant corporation as will estop it from obtaining equitable relief from an unconscionable judgment which it was prevented from defending itself against by the neglect of the officer.

The authorities upon which this case is decided should conclusively settle the apprehensions of the St. Mary's Company so earnestly urged in brief of its attorneys, that the auditor might fail in his duty and the company be then compelled to pay a judgment which it ordinarily could not have been compelled to pay, and which should not have been obtained against it.

It might further be alleged in support of the expediency of the legislation complained of, that the state did not desire to have the reputation of creating corporations authorized to do business in every state in the country except its own, and permit them to go out and do business with no known legal habitation, no existence except in name, and no assets except their seals.

The act, at least, required every company if it chose to do business under the laws of the State of West Virginia, to make known to some officer of the state creating it, its place of business, and appoint an agent who was at all times in reach of process, instead of one who, while nominally residing in some county in the state, where alone service could be made, might, in fact, be engaged in the business of the company itself in a foreign country.

We would, therefore, submit that there is nothing in the contention of the St. Mary's Company that the legislation was ill-advised, unfair or unjust.

But, as stated above, this case is not one of first impression, but one in which the decision of the Supreme Court of West Virginia holding the law valid, is final, except as to the federal question raised.

As stated in the case of Missouri Railroad Co. vs. Mackey, 127 U. S., 208:

> "The hardship or the injustice of the law, if there be any, must be relieved by legislative enactment. The only question for the federal court to examine is whether the law presented in this case is in conflict with the clauses of the Fourteenth Amendment."

The elementary rule that every reasonable construction must be resorted to to save the statute from unconstitutionality, as stated in the case of Hooper v. California, 155 U. S., 649, and the authorities therein cited, is very applicable to this case, and as stated by Chief Justice Waite in the Sinking Fund cases, 99 U. S., 718:

> "Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a doubt. One branch of the government cannot encroach upon the domain of another without danger."
>
> Fletcher v. Peck, 6th Cranch, 87.
> Dartmouth College v. Woodyard, 4 Wheat. 518.
> Livingston v. Darling, 101 U. S., 407.

A corporation, while a person under the last two clauses of section one of the Fourteenth Amendment to the Constitution, is not a citizen within the meaning of that amendment.

> Paul v. Virginia, 8 Wallace, 160.
> Brannon's Fourteenth Amendment, page 46.
> Blake v. McClung, 172 U. S., 239.
> Orent Ins. Co. v. Daggs, 172 U. S., 557.

This being so, a corporation is not, therefore, entitled to the privilege and immunities of a citizen, but only to equal protection of the laws and to due process.

As stated in Orient Insurance Co. vs. Daggs, 172 U. S., 563:

> "What it is for a state to deprive a person of life, liberty or property without due process of law is not much nearer to precise definition today than it was said to be by Mr. Justice Miller in Davidson v. New Orleans, 96 U. S., 97. The process of judicial inclusion and exclusion has proceeded, and yet this Court in Holden v. Hardy, 169 U. S., 366, again declined specific definition. Mr. Justice Brown, speaking for the Court said: 'This Court has never attempted to define with precision the words 'due process of law,' nor is it necessary in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence.' These principles were extended to the right to acquire

> property and to enter into contracts with respect to property, but it was said 'this right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers.'"

In the case of Holden v. Hardy, the statute of Utah, made the employment of workingmen in all underground mines and workings and in smelters and all other institutions for the reduction and refining of ores or metals eight hours per day, except in cases of emergency where life or property should be in imminent danger. The court there held that it was undoubtedly a limitation on the right of contract—that of the employer and that of the employed—enforced by a criminal prosecution and penalty on the former and on its agents and managers. It was held a valid exercise of the police powers of the state.

This question has been before the court frequently, but the precise point involved here has never been passed upon by it, and following the line of judicial inclusion and exclusion, we refer to the following authorities as a few of the many showing what is not prohibitive and to most of the few holding what is within the prohibition.

We here, however, desire to observe that as it is not contended that the statute in question in any manner interferes with or seeks to control interstate commerce or federal relations, that class of cases relating to that particular point are not referred to.

AND FIRST AS TO CLASSIFICATION OF PERSONS WHO ARE TO BE AFFECTED BY LEGISLATIVE ENACTMENT.

The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation.

> Pembina vs. Pennsylvania, 125 U. S., 181.
> Brannon's Fourteenth Amendment, 323.

But, as was held in the Kentucky tax cases, 115 U. S., 321, McGoon vs. Illinois, 170 U. S. 283, it only requires that the same

means and methods shall apply to all constituents of a class so that law may operate equally on all similarly situated. With the impotency of the law, the constitution has no concern.

Mobile vs. Kimball, 102 U. S., 691.

In the case at bar, having the clear right to regulate and control its own creations, the state put all non-resident domestic corporations which elected to have their places of business and works outside of the state, and all foreign corporations coming into the state, on an equal footing.

In the case of Waters-Pierce Oil Company vs. Texas, 177 U. S. page 43, the court says:

> "It is said that the statutes of Texas limit its right to make contracts and take away the property or liberty assured by the Fourteenth Amendment of the Constitution of the United States. Besides, it is asserted that the statutes make many discriminations, between persons and classes of persons, and able arguments are built upon their alleged injustice and oppression. We are not called upon to answer those arguments or to condemn or vindicate the statutes on this record.
>
> The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the state over them. What those rights are and what that power is has often been declared by this court. A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations."

In that case the citizenship of a corporation under section 2 of article 4 of the constitution was denied, and the prohibitive words of the Fourteenth Amendment held to have no broader application, and it was held that although the company had a permit to do business in the state, having complied with all the statutory requirements, it could, by violation of a legislative act thereafter passed, be prohibited from doing business in the state, the court saying:

> "Nor can the plaintiff in error claim an exemption from the principle on the ground that the permit of the company was a contract inviolable against subsequent legislation by the state. That contention was presented to the Court of Civil Appeals, and the court properly replied: 'After the act of 1889 went into effect the State granted to appellant (plaintiff in error here) authority to engage in its business within the state for a period of ten years. The act of 1889, as well as that of 1895, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute. * * * * * The act in force when the appellant entered the state informed it that for a violation of its terms the permit to do business here would be forfeited. This provision of the law was as much a part of the obligation, and as binding upon the appellant, as if it had been expressly made part of the permit.' The statute of 1889, therefore, was a condition upon the plaintiff in error within the power of the state to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it."

So with the St. Mary's Company, the plaintiff in error in the case at bar; when it accepted the charter subject to the legislative right to amend or repeal it, it cannot now complain of such amendment.

In this connection, we would refer the court to the case of Hooper vs. California, 155 U. S., 648, and the cases cited on page 652 thereof, in which case the court says:

> "Section 439 of the Penal Code of California, making

> it a misdemeanor for a person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the state relative to insurance, is not a regulation of commerce and does not conflict with the constitution of the United States, when enforced against the agent of a New York firm in California who, through his principals and by telegram, procured for a resident in California applying for it there, marine insurance on an ocean steamer, from an insurance company incorporated under the laws of Massachusetts, and which had not filed the bond required by the laws of California."

The case of Allgeyer v. Louisiana, 165 U. S., 579, is cited as an authority by the St. Mary's Company to support its contention.

While the statute in that case was held to be a violation of the constitution of the United States, the case of Hooper vs. California was distinguished, and its authority not in any manner shaken, and the court states:

> "When or how far the police power of the state may be legitimately exercised with regard to such subjects (the regulation of its own internal affairs) must be left for determination in each case as it arises."

But there Allgeyer was a citizen and as such entitled to privileges and immunities which a corporation (as in the case of the St. Mary's Company) is not entitled to receive.

In the case of the New York Life Insurance Co., 178 U. S., 389, the court says that:

> "The power of a state over foreign corporations is not less than the power of a state over domestic corporations."

and upheld the validity of the statute of Missouri in regard to life insurance companies.

In the case of the Louisville and Nashville Ry. Co. vs. Kentucky,

183 U. S., 503, it is held that this court must accept the meaning of the State enactments to be that found in them by the state courts, and says:

> "A state railroad corporation, voluntarily formed, cannot exempt itself from the control reserved to the state by its constitution, and, if not protected by a valid contract, cannot successfully invoke the interposition of Federal courts, in respect to long haul and short haul clauses in a state constitution, simply on the ground that the railroad is property.
>
> A contract of exemption from future general legislation unless it is given expressly or follows by implication equally clear with express words, cannot be deemed to exist.
>
> A railroad charter is taken and held subject to the power of the state to regulate and control the grant in the interest of the public."

In the case at bar, the public had an interest in the manner in which a corporation created by the state could be reached by its officers for service of process, or to demand a known agent actually within the confines of the state on whom process could be served.

The public interest demanding a remedy for the troubles existing as to service of process on non-resident domestic, and foreign corporations, the legislature under the right reserved to it at the time of the formation of the St. Mary's Company, had a right to pass the act complained of.

In the case of Railway Co. vs. Mackey, 127 U. S., 205, it was held that the statute making a company liable for the injury of its employees, sustained by the negligence of co-servants, was not depriving the railroad of its property without due process of law, and did not deny to it the equal protection of the law, and was not in conflict with the Fourteenth Amendment to the Constitution of the United States in either of these respects.

The court says:

"The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. * * * * * The law of 1874 extends this doctrine and fixes a like liability upon railroad companies where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt.

The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be obtained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees, and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

To the same effect is Tullis vs. Erie Co., 175 U. S., 348.

In Railway. Co. v. Humes, 115 U. S., 348, a statute making a railway corporation liable for double damages for stock killed, was

held not to deprive it of its property without due process of law.

A statute defining for taxation an express company operating on railways and steamboats, held not to discriminate against such company in favor of other company carrying express matter under different conditions. Pacific Express Co. v. Seibert, 142 U. S., 339.

And generally on this subject, see Brannon's Fourteenth Amendment, chapter 16.

In Blake vs. McClung, 172 U. S., 242, it is held that:

> "The statute of Tennessee, so far as it subordinates the claims of private business corporations not within the jurisdiction of that state (although such private corporations may be creditors of a corporation doing business within the state under the authority of that statute) to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the equal protection of the laws secured by the Fourteenth Amendment to persons within the jurisdiction of the state, however unjust such a regulation may be deemed."

In McGoun vs. Illinois Trust & Savings Bank Co., 170 U. S., 283, the classifcation by amount came up for consideration, and was sustained.

In Clark v. Titusville, 184 U. S. 329, the court held that:

> "A tax on the privilege of doing business, regulated by the amount of sales, was not repugnant to the Constitution of the United States."

And referring to the McGoun case, says in part:

> "Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment of the Constitution of the United States and the reasoning by which that conclusion was

> supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes.
>
> We said: If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. * * * * The jurisdiction of courts is fixed by amounts. The right of appeal is, as was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality; nevertheless they are universally imposed, and their illegality has never been questioned."

In Narron v. Wilmington & W. R. R. Company, 122 N. C., 856, it was held that the defendant cannot claim that he is denied the equal protection of the laws simply because he is one of a class expressly excepted from the shield of a statute of limitations.

In the case of the American Sugar Refining Company vs. Louisiana, 179 U. S., page 89, the court held that:

> "A state statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax 'planters and farmers grinding and refining their own sugar and molasses,' deny sugar refiners the equal protection of the laws within the Fourteenth Amendment."

In view of this case, can it be stated that the imposition of a tax requiring the payment of ten dollars to the auditor for acting as attorney for a non-resident domestic corporation or a foreign corporation doing business in the state, which money goes to the state, is a denial of the equal protection of the laws, or deprives the company of its property without due process of law?

This question was also referred to in the case of Central Loan &

Trust Company v. Campbell, 173 U. S., page 84, where a bond was required in attachment cases against non-resident corporations while none was required against residents. This was held not repugnant to the Fourteenth Amendment of the Constitution of the United States, and in that case, the court on page 97, further says:

> "The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the Territory, it is said, in case of an attachment, for the cause stated, against a resident of the Territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a non-resident. This, it is argued, is a discrimination against a non-resident, does not afford due process of law and denies the equal protection of the laws. The elementary doctrine is not denied that for the purposes of the remedy by attachment, the legislative authority of a state or territory may classify residents in one class and non-residents in another, but it is insisted that where non-residents 'are not capable of separate identification from residents by any facts or circumstances other than that they are non-residents—that is when the fact of non-residence is their only distinguishing feature—the laws of a state or territory cannot treat them to their prejudice upon that fact as a basis of classification.'
>
> When the exception thus stated, is put in juxtaposition with the concession that there is such a difference between the residents of a state or territory and non-residents, as to justify their being placed into distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule, which the argument attempts to make, is but a denial, by indirection, of the legislative power to classify which it is avowed the excep-

> tion does not question. * * * * * That the distinction between a resident and a non-resident is so broad as to authorize a classification in accordance with the suggestion just made is conceded, and, if it were not, is obvious. The reasoning then is, that, although the difference between the two classes is adequate to support the allowance of the remdey in the one case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is exacted in the other. The power, however, to grant in the one and deny in the other of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding, on the one hand, the power to classify residents and non-residents, for the purpose of the writ of attachment, and then from this concession, to argue that the power does not exist, unless there be something in the cause of action, for which the attachment is allowed to be issued, which justifies the classification. As, however, the classification depends upon residence and non-residence, and not upon the cause of action, the attempted distinction is without merit."

So, in the case at bar, the distinction attempted to be made by the St. Mary's Company is that inasmuch as resident corporations having their chief places of business and chief works within the state, are not required to appoint the auditor as attorney in fact, it, having its chief works outside of the state, cannot be required to appoint him, but, as was held in the case of Central Loan & Trust Co. vs. Campbell above quoted, this contention is without merit.

Applying, then, the principles of the Central Loan & Trust Company to the case at bar, the West Virginia statute is clearly not repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States.

The two cases of Barbier vs. Conley, 113 U. S., 27, and Soon

Hing vs. Crowley, 113 U. S., 703, are good illustrations of the distinction between what is and what is not invalid.

In the Conley case, a municipal ordinance prohibiting washing and ironing in public laundries within defined territorial limits from ten o'clock at night until six o'clock in the morning, was held to be a police regulation, and within the competency of a municipality vested with the ordinary powers, and that the Fourteenth Amendment to the Constitution of the United States did not impair the police power of a state.

In the Soon Hing case, it was held that:

> "It is no objection to a municipal ordinance prohibiting one kind of business within certain hours, that it permits other and different kinds of business to be done within those hours.
>
> Municipal restrictions imposed upon one class of persons engaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, impair the equal right which all can claim in the enforcement of the laws."

In the case of Yick Wo vs. Hopkins, 118 U. S., 356, following the Soon Hing case, it is held that if a municipal ordinance arbitrarily and unjustly discriminates, because of difference of race, between persons otherwise under similar circumstances, such discrimination is repugnant to the provisions of the Fourteenth Amendment.

The cases cited by us, we think, are representative on both sides of the question, and that the distinction is clearly drawn, and we submit that they show that the West Virginia statute in question does not come within the prohibition of the Fourteenth Amendment.

DOES THE REQUIREMENT THAT FOREIGN AND NON-RESIDENT CORPORATIONS PAY TO THE AUDITOR FOR THE USE OF THE STATE, THE SUM OF TEN DOLLARS,

VITIATE OR RENDER THE ENACTMENT UNCONSTITUTIONAL?

When this ten dollars required to be paid under the statute is turned over to the state, it becomes nothing more than a license or special tax imposed upon corporations as a condition or restriction upon their doing business within the state. Clearly, it is not, within the purview of the law, the taking of property without due process of law, nor is it, as above stated, an unjust discrimination.

The case of Charlotte, etc. Railroad v. Gibbs, 142 U. S., 386, required railroad companies to pay the expense of the railroad commission, and the case of People vs. Squire, 145 U. S., 175, might be referred to as an authority for the classification of corporations for the purpose of a special tax, as well as showing that even if the amount required to be paid by the corporations in West Virginia, was directed to be paid to the auditor as an attorney's fee, it could be upheld, nor does the mere fact that one is a railroad and the other an electric railway, both public service corporations, change the ruling, for as stated by Justice Fields in the Gibbs case, the railroads assumed by their acceptance of their charter, the obligations imposed thereon.

The corporation at bar, in a like case, accepted the privileges conferred upon it by the statute, and under the law is subject to reasonable restrictions.

DOES THE ACT IN QUESTION INTERFERE WITH THE OBLIGATION OF CONTRACTS?

The statute in question being passed for the purpose of having the auditor act as agent for non-resident domestic and foreign corporations, its provisions in regard to that purpose, are entirely independent of the provisions in that statute providing that corporations should not be required to pay any fee to attorneys who may have been theretofore appointed their attorneys to receive service

of process. Upon consideration of the statute as between the state and the corporation, this question of contract could not, in any manner, arise, and to that extent at least, the former statute, requiring the appointment, is repealed, and left entirely at the discretion of the corporations whether they will retain their attorneys theretofore appointed.

Should the attorney in any case sue the corporation for fee or salary for services rendered it after the enactment of the law of 1905, and show that he had been retained under the provisions of that act, he could recover under the provisions of the Act of 1905 as to payment of fees; but, if without being further retained, he should sue the corporation, the question, then, could be raised as to whether or not the statute as between the attorney and the corporation impaired the obligation of contract, but, as stated by Judge Brannon in his opinion, it cannot come into the question in this case.

The clause of the statute relieves the corporation complying with the act of 1905 from paying attorneys who had been theretofore appointed, fees for services, is not such a part of the statute, even if it is void, to render the entire enactment invalid.

This question is fully discussed in Cooley's Constitutional Limitations, Seventh Edition, page 246, and he lays down the rule, which is supported by ample authorities, and it is stated as follows:

> "It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other."

So far, then, as the question of the statute being void by reason of the provisions that fees to attorneys theretofore appointed, need not be paid, is concerned, we would refer the court to the authorities supporting the decision referred to by Judge Brannon of the West Virginia Court, and to the authorities in the United States Courts cited by Cooley's Constitutional Limitations, pages 246 and 247.

## DO THE AUTHORITIES CITED BY THE PLAINTIFF IN ERROR SUSTAIN ITS CONTENTION?

The plaintiff in error has cited but a few decisions in support of its contention, and when these are examined, they will be found, in our opinion, not to conflict with the position taken by the State that the act in question is valid.

The chief reliance of the plaintiff in error is placed on the case of Pinney vs. Providence Loan & Investment Co., 106 Wisconsin, 396, 82 N. W., 308, decided by the Supreme Court of Wisconsin in 1900, holding that the revised statute of that state, authorizing the service of process on a private corporation by leaving a copy of such process with the Register of Deeds was unconstitutional, and in violation of the Constitution of the United States, Amendment Article No. 14, Section 1.

In considering this case the Court will find that the Wisconsin court was evidently led by the apparent hardships appearing from the facts as reported, to render a decision that was clearly a *non sequiter* from the cases cited by the court in support of its decision. The attorney for the defendant corporation, it appears, had applied to the office of the Register of Deeds to learn if service had been made on the register of deeds with whom service had been filed, who, after a search of his office, stated that there were no papers in any such a case filed therein, and that it was not until after the judgment had been rendered that the defendant corporation learned that a suit had been brought. There was no provision or requirement in the Wisconsin statutes (as there is in the West Virginia statutes) for notice to be forwarded to the com-

cany or that the Register of Deeds be appointed as attorney for the purpose of accepting service, or being served. The court says that:

> "The defendant company was then a private corporation, organized and existing under the laws of that state, and had its principal office in the city of Superior. By the statutes of the state, it was required on or about October 1st, 1898, to file in the office of the Register of Deeds of that county, a list of the names of its officers upon whom service of process, notice or orders might be made, as provided by sub-division 10, § 2637, Revised Statutes. The right of the legislature to require such corporation to so file such list is not and cannot be successfully questioned. It has been said upon high authority, that: 'A state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law.' Pennoyer v. Neff, 95 U. S., 735."

Continuing, the court says:

> "It does not appear that any attempt was made to serve the summons or summons, and complaint on any of the officers of the defendant corporation as required by sub-division 10, § 2637 Revised Statutes, nor by the publication of the summons as required by section 2639 Revised Statutes."

The corporation having been barred of its claim and title to the real estate by the statute without notice, the court, continuing with his opinion, says:

> "For the purpose of this appeal, it must be assumed that at the time of the alleged service the defendant corporation had the lawful and rightful title and possession of the land. Was it deprived of such right, title and interest in and to the land by due process of law?"

And then, after quoting a number of authorities as to what is due process of law, says:

> "In the language of Mr. Justice Field, in Marchant vs. Railroad Co., 153 U. S., 380, it is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law. It must be adapted to the end to be attained. And, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

Continuing, the court says:

> "While foreign corporations may be permitted to do business within the state, upon certain conditions, or excluded altogether, and while domestic corporations may be subject to reasonable regulations and control, yet neither can be deprived of their property without due process of law. Undoubtedly the legislature may, as it has in certain cases authorize constructive service of summons to be made upon corporations as well as individuals, especially where the action concerns property located within the state; but the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity of being heard and making a defence before the determination."

The objections to the Wisconsin statute there pointed out by the court in the foregoing case are obvious, and are fully met by the West Virginia statute, which uses every precaution to secure service, and not to conceal the fact, as is said by the court to have occured in the above case.

When they continue in business in West Virginia, they are required to appoint the auditor of the state as their agent to accept service of process, and when the facts leading to the conclusions of the Wisconsin court are considered, it will be found that there are no hardships there-

in which would not have been subject to equitable relief. It is evident from reading the whole decision of the court that if the statute in Wisconsin had been of the character and had the legal principles of the one in West Virginia, the decision would have been otherwise, because the very defects pointed out in the Wisconsin statutes as the reason for the decision, do not exist in the West Virginia statutes.

Evidently the hardships which caused the decision of the Wisconsin court consisted in the defendant being deprived of its property without notice to the defendant, even when it had sought to learn of the proceeding, but, in the case at bar, the courts and the legislature of West Virginia having avoided the defects of the Wisconsin law, the statute in question in the purview of that decision is wholly constitutional.

The case of Shields vs. Ohio, 95 U. S., 319, cited by attorneys for plaintiff in error on page 18 of their brief, was a case where, under the reserved power to alter, revoke or repeal the corporation statutes, the legislative amendment of the general corporation law was held not to impair the obligation of contract.

While the case from New York, of People vs. Warden, 157 N. Y., 116, was cited as an authority to the point that it is for the courts to determine what due process of law is, and not for the legislature, it does not appear that there is any denial of that position in the case at bar, that being the very question submitted to the court for adjudication.

In the case of Mugler vs. Kansas, 123 U. S., 661, referred to by plaintiff in error on page 13 of its brief, the court while holding the statute of Kansas valid, says it is the duty of courts to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of authority, and while we admit this, we submit that the act in question cannot, for a moment, be considered as invalid; it was, as we understand it, urgently required, and clearly within the power reserved.

Lawton vs. Steele, 152 U. S., 133 cited on page 14 of brief of attorneys for plaintiff in error, is a fisheries case in reference to

destruction of nets and property of persons, unlawfully used in fishing, and the court says:

> "Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute.

The statute was held constitutional, as being in the lawful observance of police power.

Having carefully considered the decisions of the various courts, as well as others not referred to, the attorneys for the state are of the opinion that the act in question is valid, and that the decision of the Supreme Court of the State of West Virginia should be sustained.

And the case is therefore submitted to this Court and an affirmation requested.

Respectfully,

CLARKE W. MAY,

*Attorney General for the State of West Virginia.*

# Supreme Court of the United States.

No. 98.—October Term, 1906.

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| The St. Mary's Franco-American Petroleum Company, Plaintiff in Error, *vs.* The State of West Virginia. | In error to the Supreme Court of Appeals of the State of West Virginia. |

[December 3, 1906.]

This is a writ of error to review a judgment of the Supreme Court of Appeals of West Virginia awarding a peremptory writ of mandamus, commanding the St. Mary's Franco-American Petroleum Company by power of attorney duly executed, acknowledged and filed in the office of the Auditor for the State of West Virginia, "to appoint said auditor and his successors in office, attorney in fact to accept service of process and notice in this State for said St. Marys Franco-American Petroleum Company, and by the same instrument to declare its consent that service of any process or notice in this State on said attorney in fact, or his acceptance thereof indorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon the said St. Marys Franco-American Petroleum Company, and that the petitioner recover from the respondent, her costs about the prosecution of her petition in this court in this behalf expended."

It was agreed by the parties that no rule to show cause need be issued on the petition for mandamus, nor any alternative writ, but that the petition might stand as such writ and the case be determined on demurrer thereto, which was filed.

The petition, among other things, averred that the St. Mary's Company was "a nonresident domestic corporation, organized, chartered, existing and carrying on its corporate business under and by virtue of the laws of the State of West Virginia, but having its principal office and place of business and chief works in the city of Lima, in the State of Ohio;" that the corporation "was organized, and now exists by virtue of a charter issued to it by the Secretary of State of the State of West Virginia on the 18th day of January, 1902;" and that "on the 17th day of February, 1902, the said defendant corporation, by power of attorney, duly and legally executed, filed and recorded, appointed one Wm. M. O. Dawson, a resident of the county of Kanawha in the State of West Virginia, to accept service on behalf of said corporation, and as a person upon whom

service may be had of any process or notice, and to make returns of its property for taxation."

At the time the company was incorporated section 8 of chapter 53 of the State code read:

"Where the legislature has the right to alter or repeal the charter or certificate of incorporation heretofore granted to any joint stock company, or to alter or repeal any law relating to such company, nothing contained in this chapter shall be construed to surrender or impair such right. And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company. But in no case shall such alteration or repeal affect the right of the creditors of the company to have its assets applied to the discharge of its liabilities, or of its stockholders to have the surplus, if any, which may remain after discharging its liabilities and the expenses of winding up its affairs, distributed among themselves in proportion to their respective interests."

And section 24 of chapter 54:

"Every such corporation having its principal office or place of business in this State shall, within thirty days after organization, by power of attorney duly executed, appoint some person residing in the county in this State wherein its business is conducted, to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make such return for and on behalf of said corporation to the assessor of the county or district wherein its business is carried on, as is required by the forty-first section of the twenty-ninth chapter of the code. Every such corporation having its principal office or place of business outside this State shall, within thirty days after organizing, by power of attorney duly executed, appoint some person residing in this State to accept service on behalf of said corporation, and upon whom service may be had of any process or notice, and to make return of its property in this State for taxation as aforesaid. The said power of attorney shall be recorded in the office of the clerk of the county court of the county, in which the attorney resides, and filed and recorded in the office of the Secretary of State, and the admission to record of such power of attorney shall be deemed evidence of compliance with the requirements of this section. Corporations heretofore organized may comply with said requirements at any time within three months after the passage of this act. Any corporation failng to comply with said requirements within six months after the passage of this act, shall forfeit not less than two hundred nor more than five hundred dollars, and shall, moreover, during the continuance of such failure, be deemed a nonresident of this State, and its property, real and personal, shall be liable to attachment in like manner as the property of nonresident defendants; any corporation failing so to comply within twelve months after the passage of this act shall, by reason of such failure, forfeit its charter to the State, and the provisions of section eight, chapter twenty, acts one thousand eight hundred and eighty-five, relative to notice and publication, shall apply thereto."

On the 22d day of February, 1905, the legislature of West Virginia passed an act, chapter 39 of the Acts of 1905, which is as follows:

"SEC. 1. The auditor of this State shall be, and he is hereby constituted, the attorney in fact for and on behalf of every foreign corporation doing business in this State, and of every nonresident domestic corporation. Every such corporation shall, by power of attorney, duly executed, acknowledged and filed in the auditor's office of this State, appoint said auditor, and his successors in office, attorney in fact to accept service of process and notice in this State for such corporations, and by the same instrument it shall declare its consent that service of any process or notice in this State on said attorney in fact, or his acceptance thereof indorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said corporation.

"SEC. 2. Such foreign or nonresident domestic corporation shall at the time of taking out its charter, or procuring its authority to do business in this State, as the case may be, pay to the auditor as its said attorney ten dollars for his services as such for the then current year ending on the 30th day of April next ensuing; and on or before the first day of May, for each year, such corporation shall pay to said auditor the like sum of ten dollars for his services as such attorney. And all such corporations as have heretofore taken out charters, or procured authority to do business in this State, shall for the fiscal year commencing on the first day of May, nineteen hundred and five, pay the sum of ten dollars to the auditor as the fee for such attorney to receive service of process, and annually thereafter a like sum, and such corporation shall not be required to pay any fee to the person who may have been heretofore appointed its attorney to receive service of process. All moneys received by the auditor under this chapter shall belong to the State, and be by him immediately paid into the State treasury. The auditor shall keep in a well bound book in his office a true and accurate account of all moneys so received and paid over to him.

"SEC. 3. The post office address of such corporation shall be filed with the power of attorney, and there shall be filed with the auditor from time to time statements of any changes of address of said corporation. Immediately after being served with, or accepting, any such process or notice, the auditor shall make and file with said power of attorney a copy of such process or notice with a note thereon indorsed of the time of service, or acceptance, as the case may be, and transmit such process or notice by registered mail to such corporation at the address last furnished as aforesaid. But no such process or notice shall be served on the auditor or accepted by him less than ten days before the return thereof.

"SEC. 4. In addition to the auditor, any such company may designate any other person in this State as its attorney in fact, upon whom service of process or notice may be made or who may accept such service. And, when such local attorney is appointed, process in any suit or proceeding may be served on him to the same effect as if the same were served on the auditor.

"SEC. 5. Failure to pay the attorney's fee as hereinbefore required shall have all the force and effect, and subject such corporation to the same penalties and forfeitures, as are or may be prescribed by law for failure to pay the license tax required to be paid by such corporation.

"SEC. 6. Any corporation failing to comply with the provisions of this act in so far as it relates to the appointment of the auditor as its statutory attorney, within ninety days from its incorporation, shall forfeit one hun-

dred dollars as a penalty for such failure, and upon failure to pay such penalty, the charter of such corporation shall thereby be forfeited and void."

The company refused to comply with the act, and, thereupon, this proceeding was instituted.

Mr. Chief Justice FULLER delivered the opinion of the Court:

It is argued that the act of February 22, 1905, is invalid under the Fourteenth Amendment, in that it deprives the company of liberty of contract and property without due process of law, and denies it the equal protection of the laws. But in view of repeated decisions of this court, the contention is without merit. The State had the clear right to regulate its own creations, and, *a fortiori*, foreign corporations permitted to transact business within its borders.

In this instance it put all nonresident domestic corporations, which elected to have their places of business and works outside of the State, and all foreign corporations coming into the State, on the same footing in respect of the service of process, and the law operated on all these alike.

Such a classification was reasonable and not open to constitutional objection. *Orient Insurance Company* v. *Daggs*, 172 U. S. 557, 563; *Waters-Pierce Oil Company* v. *Texas*, 177 U. S. 43; *Central Loan and Trust Company* v. *Campbell*, 173 U. S. 84; *National Council* v. *State Council*, decided November 19, 1906, *ante*, p. ; *Northwestern Life Insurance Company* v. *Riggs*, *ante*, p. ; Brannon on Fourteenth Amendment, Chap. 16.

It is true that the prior law left it to the corporation to appoint an attorney to represent it, and that the act of February, 1905, changed this so as to make the auditor such attorney, but this at the most was no more than an amendment as to the appointment of an agent, and when the St. Mary's Company accepted its charter it did so subject to the right of amendment. And we agree with the State court that the requirement of the payment of ten dollars to the auditor for the use of the State does not amount to a taking of property without due process or an unjust discrimination. *Charlotte Railroad* v. *Gibbs*, 142 U. S. 386; *People* v. *Squire*, 145 U. S. 175. If the act is valid, that is.

The objections going to the expediency or the hardships and injustice of the act, and its alleged inconsistency with the State constitution and laws, are matters with which we have nothing to do on this writ of error, and the question whether the provision that the corporation shall not be required to pay any fee to any one theretofore appointed an attorney is invalid or not, requires no consideration on this record.

*Judgment affirmed.*